SHR:LHR:bjg
DJ 166-54-69

Recommended lawsuit against North Carolina Republican Party, Helms for Senate Committee, et al. under 42 U.S.C. 1971(b) and 42 U.S.C.1973i(b)
ACTION MEMORANDUM

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I. Recommendation

We recommend that the attached complaint be filed against the North Carolina Republican Party, the Helms for Senate Committee, Jefferson Marketing, Inc., Computer Operations and Management Professionals, Inc., Discount Paper Brokers, Inc., Campaign Management, Inc., Edward Locke and Douglas Davidson, to obtain declaratory and injunctive relief under 42 U.S.C 1971(b) and Section 11(b) of the Voting Rights Act. The complaint alleges that the named defendants conducted a postcard mailing program designed to intimidate and threaten black voters throughout the State of North Carolina in order to discourage them from participating in the November 6, 1990 general election, in violation of 42 U.S.C. 1971(b). The complaint also alleges that, irrespective of the defendants' intent, the postcard reasonably tended to intimidate the selected voters and thus violated Section 11(b) of the Voting Rights Act.

II. Facts

A. Background

According to the 1990 Census, North Carolina has a total voting-age population of 5,071,000 persons, 1,027,000 (20.25%) of whom are black. As of October 8, 1990, there were 3,347,635 registered voters in the state, 635,045 (18.97%) of whom were black. On November 6, 1990, in addition to the myriad local elections and congressional election contests, there was a hotly contested interracial contest for the U.S. Senate in North Carolina between incumbent Republican Jesse Helms (W) and Democrat Harvey Gantt (B). If Mr. Gantt had won, he would have been the first black person in this century to represent a southern state in the U.S. Senate.

B. Overview

The contest between Senator Helms and Mr. Gantt for the seat in the U.S. Senate was extremely hard-fought and contentious. In addition to the millions of dollars spent on advertising during the campaign, a significant amount of funds and resources of the respective candidates' committees and the respective political parties were devoted to voter registration efforts during the latter half of 1990. These efforts resulted in an increase in the statewide black voter registration of 10.6 percent as compared to an increase in the statewide white voter registration of 5.3 percent. The newly registered black voters increased the percentage of black registered voters in the state from 18.2 percent in April, 1990 to 19 percent in October 8, 1990. This information showing an increase in black voter registration was released on or about October 18.

As election day neared, the polls indicated that the race between Senator Helms and Mr. Gantt was likely to be extremely close. Indeed, a poll released on September 22, 1990 found 46 percent of the surveyed voters supported Senator Helms, 45 percent backed Mr. Gantt. In the third week of October, however, the polls gave Mr. Gantt the advantage, with one poll on October 19 showing him leading by as many as eight percentage points.

It is against the backdrop of the increased black voter registration and the release of polls showing Mr. Gantt with a lead that the actions taken by the prospective defendants must be viewed. Prior to October, 1990, our investigation revealed that although "ballot security" had been discussed jointly by the Helms for Senate Committee ("Helms Committee") and the North Carolina Republican Party ("NCGOP"), no concrete steps had been taken to implement a "ballot security" program.1/ However,

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1/ The term "ballot security" has been used over the years to describe a myriad activities that allegedly are conducted to combat and deter election fraud. "Ballot security" efforts have previously been the subject of litigation in both the federal and state courts. In 1982, the Democratic National Committee ("DNC") filed a lawsuit against the Republican National Committee ("RNC") alleging that "ballot security" efforts being conducted and/or financed by the RNC were designed to intimidate minority voters and constituted a violation of inter alia, Section 11(b) of the Voting Rights Act. The case, Democratic National Committee v. Republican National Committee, C.A. No. 81-3876 (D.N.J. 1982) was settled by consent decree in which the RNC agreed, inter alia, to "refrain from undertaking any ballot security activities in polling places or election districts where the racial or ethnic

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during the beginning of the third week of October, contemporaneous with the release of voter registration figures showing a disproportionate increase in black voter registration and of polls showing Mr. Gantt with a substantial lead, the decision was made to implement a "ballot security" program in connection with the November, 1990 election and to direct such efforts almost exclusively at black voters. As will be fully

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1/(...continued)
composition of such districts is a factor in the decision to conduct, or the actual conduct of, such activities there and where a purpose or significant effect of such activities is to deter qualified voters from voting."

In 1986, the DNC reopened the 1982 litigation against the RNC claiming that "ballot security" activities undertaken by the RNC in Louisiana, Indiana, and Missouri, which included mailing letters to voters in predominantly black precincts and then attempting to purge from the registration rolls those voters whose letters were returned as undeliverable, violated the 1982 consent agreement. This action was also settled by consent decree; the parties amended the 1982 agreement to require that the RNC seek approval from the court prior to undertaking any "ballot security" activities to ensure that such activities comply with the terms of the decree. Democratic National Committee v. Republican National Committee, C.A. No. 86-3692 (D.N.J. 1987).

Also in 1986, a state court action in Louisiana was filed to enjoin the attempted purge of black voters described above. In Long v. Gremillion, C.A. No. 142,389 (Ninth Judicial District, Rapides Parish, La. 1986), the court granted injunctive relief, finding that the attempt to purge under this procedure violated state law governing the purging of voters as well as the Constitution of the State of Louisiana and the Fifteenth Amendment to the U.S. Constitution.

In November, 1990, the DNC filed a motion to reopen discovery in the 1986 case to determine whether the postcard mailing in North Carolina constituted a violation of the consent agreement. After permitting limited discovery over the weekend before the election, the court ruled that the DNC failed to establish a sufficient link between the RNC and the postcard mailing to hold the RNC responsible for the postcard mailing. The court did find, however, that the RNC had violated the consent decree by failing to advise state Republican committees and party organizations of the types activities that were prohibited under the terms of the consent decree.

explained below, the "ballot security" program, in particular the postcard mailing component of the "ballot security" program, was designed to intimidate and confuse black voters eligible to vote in the November election and thus decrease the turnout of the group of voters most likely to vote for Mr. Gantt.

As part of the "ballot security" program, on October 26 and October 29, 1990, about 124,000 postcards containing the following message were mailed virtually exclusively to black voters throughout the State of North Carolina.

Voter Registration Bulletin

If you moved from your old precinct over 30 days ago, contact the County Board of Elections for instructions for voting on Election day.

When you enter the voting enclosure, you will be asked to state your name, residence and period of residence in that precinct. <u>You must have lived in that precinct for at least the previous 30 days or you will not be allowed to vote.</u>

It is a Federal crime, punishable by up to five years in jail, to knowingly give false information about your name, residence, or period of residence to an Election Official.

The postcard mailing was comprised of two mailings based on distinct criteria for selecting the voters who were to be sent cards. One mailing of 44,130 cards was targeted exclusively at black voters throughout the state who had a "change of address" associated with their name, based upon a "change of address" list provided by a Chicago mass mailing outfit that had a contract with the Republican National Committee. Thus, black Democrats black Republicans, and black unaffiliated voters who had a "change of address" appended to their file were mailed postcards. The postcards to this group were sent bulk rate to the "new" address and did not have the Republican Party disclaimer.

The other mailing of 81,446 cards was targeted at households with at least one registered Democrat in 86 selected precincts throughout the state. The precincts were chosen based upon the party affiliation and racial composition of the registered voters within the precincts, and their level of support either for Senator Helms during the 1984 Senate contest against Jim Hunt, or for President Bush in the 1988 Presidential contest. Black voters constituted approximately 94 percent of the registered

voters within the targeted precincts. The postcards to this group had the Republican Party disclaimer "Paid for by N.C. Republican Party" on the bottom of the card and were sent first-class with address corrections requested.

In addition, on October 31 and November 1, an effort was made to resend first-class postcards to Charlotte, Mr. Gantt's home town, that had been erroneously addressed and thus had never been delivered by the postal service. This effort was undertaken contemporaneous or subsequent to the initial press accounts calling into question the accuracy of the card.

After the mailing, concerted efforts were made to sort the first-class postcards returned with a corrected address to develop lists of voters for use at the polling places on election day as part of the "ballot security" program. Those efforts were called to an abrupt halt late in the day on November 2, the day the FBI agent first made contact to begin our investigation.

The postcard mailing operation was financed by the NCGOP and was primarily coordinated by Edward Locke, a political consultant from Charlotte who had spearheaded the 1984 "ballot security" program for the NCGOP and the 1984 Helms for Senate Committee. Indeed, it appears that Locke played a major role in every critical decision concerning the postcard mailing. The evidence shows that representatives of 1990 Helms for Senate Committee and the NCGOP jointly decided to undertake a "ballot security" effort and finance it with NCGOP funds, and that Helms Committee and NCGOP representatives played significant roles in contracting with Locke to coordinate the "ballot security" program and in formulating a proposed set of activities for the "ballot security," program, including the postcard mailing. The Helms Committee also devoted personnel and office space to Mr. Locke for purposes of his work on the "ballot security" program.

The Jefferson Marketing Companies,2/ a group of companies primarily involved in direct-mail fund-raising, advertising and consultant work on behalf of conservative Republican candidates, and political organizations such as the National Congressional Club, an organization originally formed to support Senator Helms' election efforts in the 1970s, were involved in all facets of the production of the postcard mailing. In addition, Mr. Doug Davidson, an employee of Campaign Management, one of the subsidiaries, worked closely with Locke on the postcard mailing and conferred with him concerning both the text of the postcard and the targeting criteria for the card. Davidson also served on the Helms Committee and appears to have been the main conduit of

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2/ These companies include, Computer Operations and Management Professionals, Inc., (Comp, Inc.), Discount Paper Brokers, Inc. and Campaign Management, Inc.

information to the Helms Committee concerning "ballot security." Davidson appears to have had supervisorial and managerial authority over the personnel and resources of Discount Paper Brokers, Inc., Campaign Management, Inc., and Computer Operations and Mailing Professionals, Inc.

The evidence shows that Locke was serving as an "agent" of the NCGOP as well as the Helms Committee to coordinate the 1990 "ballot security" program. All of his conduct was undertaken within the scope of this agency relationship and his conduct was later ratified by the principal organizations. Accordingly, such organizations are responsible for Locke's conduct in effectuating the "ballot security" program. It also appears that Davidson was acting on behalf of the Helms Committee in performing work on the ballot security program and thus his actions also implicate the Helms Committee. In addition, Davidson, an employee of Campaign Management, had supervisorial and managerial authority over the personnel and resources of Campaign Management, Inc., as well as Discount Paper Brokers, Inc. and Comp, Inc. These organizations should also be held responsible for Davidson's conduct.

The evidence compiled thus far reveals that Locke played a primary role in drafting the text of the postcard and in selecting the targeting criteria for the postcards, and that he acted with an intent to intimidate and threaten black voters and to discourage them from participating in the 1990 election.

Furthermore, Doug Davidson also played a significant role in the selection of voters to be mailed postcards and likely also participated in the project with the understanding that the cards were designed to frighten black voters and chill participation in the November 6 election. Information we have obtained suggests, however, that Davidson and Locke did not act alone, as individuals with the Jefferson Marketing Companies and/or the Helms Committee may have reviewed the targeting criteria and the text of the postcard prior to the mailing of the cards. Most important in this regard is the fact the final version of the card is different from the last version that was provided to the graphic artist by Locke. In addition, at least one Jefferson Marketing executive was involved in attempting to remail first-class postcards that had been misaddressed at the same time that the press was reporting that the cards inaccurately reflected North Carolina state law.

C. Accuracy of the Contents

The text of the postcard is a false and misleading statement of North Carolina law on three separate grounds.

1. Voters Who Have Moved More Than 30 Days Before The Election

The second sentence of the middle paragraph of the postcard states that "[y]ou must have lived in that precinct [in which you are registered] for at least the previous thirty days, or you will not be able to vote."

In 1983, the North Carolina legislature enacted a law which provided that a voter "who has moved from one precinct to another within the same county more than 30 days before a primary or election but who has never not submitted a change of address report," may upon following the requisite procedures, cast a regular ballot in the election. N.C. Gen. Stat. § 163-72.3. The statute provides that a voter, upon appearing to vote at the precinct in which he previously resided, shall inform the registrar at that precinct of his new address within the county and shall be given a transfer voting certificate. At this point, the precise procedure varies from county to county. Some counties instruct such voters to cast their ballot at the county board of elections office or a site specifically designated for transfer voters. Other counties permit voters to take their transfer certificates and vote in the precinct in which they currently reside. Whatever the procedure, it is clear that the postcard statement does not accurately reflect state law, as a voter <u>may vote</u> even if he has not resided in the precinct in which he is registered for the previous thirty days prior to the election.

2. Voters Who Have Moved Within 30 Days of the Election

The underlined sentence of the middle paragraph of the card is also contrary to the Constitution of the State of North Carolina. Article VI, Section 2 of the North Carolina Constitution provides that a voter who has moved from one precinct to another within the State and within thirty days of an election may vote a regular ballot in the precinct in which such voter previously resided even though the voter has not lived in that precinct for "at least the previous thirty days." According to the North Carolina Constitution, "[r]emoval from one precinct, ward, or other election district <u>shall not operate</u> to deprive any person of the right to vote in the precinct. . .from which that person has removed until 30 days after the removal." Thus, contrary to the postcard, a recently moved voter may vote in a precinct -- the one from which the voter has moved -- despite not having lived there during the entire 30 day period prior to the election.

3. No Requirement To State Period of Residence

The card also misstates North Carolina law, and well-settled practice, in a third respect. The first sentence of the middle paragraph states, "[w]hen you enter the voting enclosure, you will be asked your name, residence and period of residence in that precinct." However, under N.C. Gen. Stat. § 163-150, a

voter is instructed only to "state his name and place of residence to one of the judges of election." Current and former State election officials advised us that they are aware of no county which instructs its poll officials to ask a voter the period of time in which the voter has lived in his residence. Thus, the postcard's assertion is not mandated by North Carolina law and apparently does not comport with the practice in the State.

Alex Brock, the Director of the State Board of Elections, recognized the inaccuracy of the postcards and issued a press release prior to the election that contained accurate voter residency requirements. William Culp, Supervisor of the Mecklenburg County Board of Elections, a county in which a significant number of targeted voters resided, not only issued a press release to correct the misinformation but aired public service messages on the black-oriented radio stations to inform voters of the accurate eligibility requirements. In addition, several other county boards of elections that were flooded with phone calls form voters who were receiving cards, informed voters that the cards were inaccurate and went on to provide them with correct information.

D. The Investigation

Our investigation began on November 1, 1990, the day we obtained reliable information that the postcards at issue had been sent primarily to black voters throughout the State. On that day, we requested that the FBI contact Jack Hawke, Chairman of the North Carolina Republican Party, and ask Mr. Hawke, among other things, the method used to select the voters who were sent postcards and all plans regarding the use of the returned postcards. Mr. Hawke refused to return FBI Agent George Dyer's phone calls, and eventually referred Dyer to his attorney, Thomas Farr, an attorney with Maupin, Taylor, Ellis and Adams, in Raleigh, who was immediately advised by Mr. Dyer of the information we sought from the North Carolina Republican Party.

On Monday, November 5, 1990, after receiving no information responsive to our request, you contacted Mr. Farr and insisted that he provide us with the information we requested by that afternoon. During this conversation, Farr assured you that no information obtained from the returned cards would be used as a basis to challenge voters on election day. Late in the afternoon on November 5, Farr telefaxed to us a list of precincts, which he orally represented to be the precincts in which the voters selected to receive the postcards resided.3/ Although Farr also

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3/ In a later correspondence, Farr disavowed that he made any representation suggesting that the only voters who received

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advised us that Hawke would be made available that day for an interview with Dyer and myself, Hawke in fact did not submit to a voluntary interview that day.

The lack of cooperation which marked the initial stages of the investigation has persisted during the course of our investigation. Soon after the election, we contacted the North Carolina Republican Party, the Jefferson Marketing Companies, Mr. Ed Locke, and Mr. Doug Davidson, and requested that they provide us with all information relevant to our investigation. Mr. Hawke and Ms. Effie Pernell, the Executive Director of the North Carolina Republican Party, voluntarily spoke with Dyer on November 9, 1990. In late November, we received a request from Mr. Michael Carvin, one of the attorneys representing the North Carolina Republican Party, for a meeting with Department attorneys to discuss our investigation. At the time we received this request, we were on the verge of obtaining voluntary statements from individuals associated with Jefferson Marketing and from Doug Davidson. However, the respective counsel chose to delay the scheduling of any interviews until we responded to Mr. Carvin's request. Asserting that the requested meeting would be "premature," we declined the invitation to meet with Carvin on December 21.

Carvin persisted in his efforts to meet with us as he repeated his request in January. For the same reasons, we again declined to meet with him and also outlined all of the information that we had requested from his clients but had not yet received.4/

After our second denial of Mr. Carvin's request, more than two months after our initial request for information, individuals from the Jefferson Marketing Companies and Doug Davidson voluntarily provided us with information and documents. At their request all of these interviews were transcribed and conducted by Mr. Rosenbaum and myself. Although the individuals we interviewed provided us with important information concerning the postcard mailing, the various counsel involved instructed their clients not to answer several questions that are clearly relevant

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postcards resided in one of the precincts identified on November 5.

4/ Although Mr. Carvin asserted that we had been provided with all requested documents by February 8, 1990, we subsequently discovered that several documents had not been disclosed. Documents responsive to our request were just provided in the last week of March, nearly four months after our initial request and almost two months after we had been advised that all such documents had been produced.

to our investigation. In addition, with respect to the Jefferson Marketing Companies, at the conclusion of the interviews we outlined pieces of information and documents which we had requested but had not received. After a lengthy delay without a response to our request, counsel for the Jefferson Marketing Companies advised us that his clients will no longer voluntarily cooperate with our investigation.

After it became clear that individuals associated with the Helms Committee also were involved in the 1990 "ballot security" program, we asked these individuals to provide us with relevant information. Their response, like that of the North Carolina Republican Party, did not reveal a desire to cooperate. They initially agreed to submit to voluntary interviews under the condition that we agree to their definition of the legitimate scope of our investigation. We, of course, refused to accede to such a demand and advised them that their insistence upon such a condition would be construed as a refusal to cooperate voluntarily. Subsequently, approximately one month after our initial request, the individuals associated with the Helms Committee agreed to speak with us voluntarily; like the others, they insisted that the interviews be transcribed. Also, similar to the other interviews, these individuals have refused to provide with us all of the information relevant to our investigation and not protected by the attorney-client privilege.5/

In addition, during the first week of our investigation, Dyer contacted Edward Locke and asked that he provide us with any information he possessed concerning the 1990 "ballot security" program, including the postcard mailing. Locke advised Dyer that he was represented by Kenneth Andreason of Charlotte and requested that all further inquiries regarding the investigation be made through Andreason. Andreason subsequently informed Dyer that Locke would not provide us with any information absent a grant of criminal use immunity. After several conversations between myself and Andreason, Andreason decided to offer a general summary of Mr. Locke's testimony to provide us with some basis to evaluate Locke's request for use immunity.6/

5/ During the past several months in which we have been attempting to gather information from the primary individuals and entities responsible for the mailing, Dyer has contacted numerous individuals who played more of a peripheral role in the mailing or possess background information concerning one or more of the principal participants. This information has been critically important to our investigation.

6/ In this memorandum, the term "Locke's proffer" refers to this summary of testimony offered by Andreason on behalf of Locke.

Over the past two months, the following individuals have been interviewed by Mr. Rosenbaum or myself. All of these interviews have been recorded and transcribed by a court reporter:

Ms. Joan McKeithan (computer programmer, Computer Operations and Mailing Professionals, Inc. (Comp, Inc.))

Ms. Frances Pope (operations manager, Comp, Inc.)

Ms. Peggy Underwood (data processing manager, Comp, Inc.)

Ms. Sheila Talton (account representative, Discount Paper Brokers, Inc.)

Mr. Doug Davidson (former employee, Campaign Management, Inc.)

Mr. Calvin Kervin (President, Discount Paper Brokers, Inc.)

Mr. Mark Stephens (President, Jefferson Marketing, Inc.)

Mr. Carl Ward (former treasurer, NCGOP)

Ms. Elizabeth McCommons (finance director, NCGOP)

Mr. Chris Gardner (former staff assistant, NCGOP)

Mr. Thomas Ballus (communications director, NCGOP)

Ms. Amy Starling (former employee, 1990 Helms Committee)

Mr. Thomas Farr (attorney, Maupin, Taylor, Ellis & Adams, P.A.)

Mr. Peter Moore (campaign manager, 1990 Helms Committee)

Mr. Carter Wrenn (consultant to 1990 Helms Committee)

In addition, we repeatedly have asked counsel for the NCGOP for an opportunity to re-interview Jack Hawke and Effie Pernell to clarify their previous responses and to make inquiries into areas that had not been delved into during their interviews with Dyer. The NCGOP refused to make Hawke and Pernell available for any further interviews.

D. <u>The 1990 "Ballot Security" Program</u>

The postcard mailing was one component of the 1990 "ballot security" program financed by the NCGOP. The wheels for the 1990 "ballot security" program were set in motion long before the actual mailing of the postcards. According to Doug Davidson, of

Campaign Management, Inc., "ballot security" was discussed at several meetings held during the summer months of 1990. These meetings were attended by Davidson, Carter Wrenn, a consultant to the Helms Committee, Peter Moore, the campaign manager for the Helms Committee, Jack Hawke, Chairman of the NCGOP, and Effie Pernell, Executive Director of the NCGOP. During these meetings, in addition to discussing general campaign strategy, Davidson recalls that a consensus was reached that some type of "ballot security" effort needed to be undertaken prior to the 1990 general election. Peter Moore confirmed Davidson's recollections, as he recalls meetings in which discussions focused upon the need for a "ballot security" program in connection with the November, 1990 election. At one of these meetings involving the leadership of the Helms Committee and the NCGOP, the decision was made to budget $25,000 for the 1990 "ballot security" program and to finance the "ballot security" program with NCGOP funds.

In early September, 1990, Ed Locke, a political consultant from Charlotte who had played a major role in organizing the 1984 "ballot security" program for the NCGOP and the 1984 Helms Committee, contacted Tom Farr to offer his services for coordinating the 1990 "ballot security" program.7/

On October 16th, Davidson and possibly Tom Farr, who had worked with Ed Locke on the 1984 "ballot security" program for the NCGOP and the Helms Committee,8/ contacted Locke by telephone in Charlotte and asked Locke if he would be willing to meet in Raleigh to discuss the 1990 "ballot security" program. Apparently Peter Moore and Carter Wrenn had been consulted concerning contacting Locke for discussions on the "ballot security" program and had given their assent to pursue such

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7/ Locke knew Farr from their work on the 1984 Helms campaign, and in particular, the 1984 "ballot security" program. Farr was the primary coordinator of the 1984 "ballot security" program conducted by the NCGOP and 1984 Helms for Senate Committee. He coordinated several "ballot security" activities in 1984, including a postcard mailing to voters in predominantly black precincts which was designed to serve as a basis to challenge voters on election day (see footnote 6, infra). Locke apparently worked with Farr on this project as well as other "ballot security" activities. Although Farr did not play an active role in the 1990 Helms campaign, he was sufficiently connected to the Helms Committee to notify the appropriate people at the Committee concerning his phone call from Locke.

8/ At various points during the course of our investigation, Farr has represented the NCGOP, the Helms for Senate Committee, Peter Moore, Carter Wrenn and Ed Locke.

discussions. Locke agreed to meet with the Helms Committee representatives and flew to Raleigh the next day.

In Raleigh, he met initially with Moore, Davidson, and Farr. This meeting was held at Farr's law firm, Maupin, Taylor, Ellis & Adams. At the meeting, the participants apparently reviewed the 1984 "ballot security" program with an eye toward the activities that should be undertaken in 1990. Davidson stated that by the end of the meeting they had formulated a tentative outline for the 1990 "ballot security" effort. Davidson recalls that a mailing targeted at voters who no longer resided in the precinct in which they are registered was one of the projects suggested for 1990. They also discussed who would be best suited to coordinate the "ballot security" effort.

According to Farr, he told the attendees of the meeting that there was only a limited number of "ballot security" programs that could be undertaken with only about three weeks left in the election. Farr also stated that the need for a "ballot security" program was not as compelling as in 1984, since, unlike in 1984, the state had a Republican governor. Since the Governor has power to appoint two out of the three members of each county's board of elections, Farr explained that the Republican-controlled county election boards throughout the state would serve effectively as a statewide "ballot security" program, as they would ensure a fair election process for Republican candidates. He suggested that contact be made with a Republican board of elections member in every county to ensure that they will be working on election day. He also suggested that, to the extent that any "ballot security" programs are undertaken, they should focus on those precincts with little or no Republican presence at the polls. To this end, he advised that the Helms Committee/NCGOP should hire observers to watch the opening and closing of the polls in such precincts. He suggested that it may also be helpful to publicize the fact that a "ballot security" program is going to be undertaken.

When the idea of a card mailing was raised, Farr told us that he explained to Locke and the others that while during the 1984 election, state law provided that returned postcards may serve as prima facie evidence that a voter was not properly registered to vote in that precinct, such procedures had been altered subsequent to that election so that a returned mailing could no longer serve to support an election day challenge of voters. He told the others that in light of this change, a postcard mailing like the mailing conducted in 1984 would not be

particularly useful, except for use as evidence in post-election challenges.9/

After this meeting, Locke, Davidson, and Moore then returned to Davidson's office to further discuss the 1990 "ballot security" program. This meeting focused upon the personnel and material resources that would be required for the various "ballot security" projects that were under discussion. The discussion involved, among other things, the type of information that would be needed to produce a mailing aimed at voters who had moved from the precinct in which they were registered. Specifically, they discussed the need for a summary analysis of the "moved voter data" that had been obtained from a company in Chicago that specializes in providing "change of address" and other demographic information. 10/ According to Davidson, Mark Stephens, President of Jefferson Marketing, Inc., was brought into the meeting for this discussion to determine the availability of the "moved voter" data analysis, and the resources that Jefferson Marketing would be able to allocate to this effort. Although both Davidson and Stephens claim that they cannot recall the details of their conversation concerning the "moved data" data, it appears likely that the idea of targeting only black "moved voters" surfaced at this meeting since the

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9/ In 1984, the 1984 Helms Committee sent a postcard to selected voters throughout the state which contained an endorsement of Senator Helms from a black minister in Raleigh and included the instruction "address correction requested" so that the card would be returned if undeliverable. Apparently, the cards were never used as a basis to challenge voters, possibly because the Department announced a few days prior to the election, as we did this year, that we would have attorney observers in North Carolina to help ensure a fair election process.

Apparently in response to the Helms Committee mailing, in 1985, the North Carolina legislature amended N.C. Gen. Stat. § 163-88, the provision which governs the procedures for election day challenges, to provide that returned mail "shall not be admissible evidence" in an election day challenge. Prior to 1985, such mail was accepted as prima facie evidence that a voter no longer resided at the address under which she was registered.

10/ MetroMail, based out of Chicago, received a statewide voter registration file from the NCGOP in late August, 1990 and appended, among other things, "change of address" information and a telephone number to each individual voter file. MetroMail provided this information to the NCGOP pursuant to a contract between the RNC and MetroMail to render such services to state party organizations in all fifty states.

eventual request for the "moved voter" analysis was in fact a request for a summary of the data by race.

At some point during or immediately after the two meetings involving Locke described above, a decision was made to retain Locke to coordinate the "ballot security" program. That such a decision was made at this time is demonstrated by the fact that during or at the conclusion of these meetings, Moore assigned Ms. Amy Starling, a paid employee of the Helms Committee, to work with Mr. Locke on the "ballot security" program, and provided Mr. Locke with office space within the Helms Committee headquarters.

Apparently Locke returned to Charlotte shortly after the afternoon meeting and prepared a summary memorandum proposing a schedule of activities and projects for the 1990 "ballot security" program.11/ This memorandum was telefaxed to Davidson. Davidson passed a copy of the fax to Moore, who in turn passed a copy to Amy Starling. We have no evidence which suggests that any representative of the NCGOP saw this faxed memorandum. Davidson apparently telephoned Locke soon after receiving the memorandum and formally advised Locke to go forward with the proposed program. Davidson claims that he cannot recall whether he distributed Locke's memorandum to others.

Locke returned to Raleigh on or before October 22, 1990 and met with Jack Hawke and Effie Pernell of the NCGOP. At this meeting, Locke and Davidson reviewed the projects planned for the "ballot security" program, which, according to a memorandum dated October 22 from Locke to Hawke included the mailing to "moved voters," a press conference outlining state voter eligibility requirements and federal and state penalties for election fraud,

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11/ We have not yet been provided with a copy of this memorandum. Locke's counsel has advised us that Locke possesses a copy, but as noted above, will not provide us with the document nor any other information absent a grant of use immunity with respect to criminal prosecution. Davidson claimed he maintained a "ballot security" file while working at Campaign Management, Inc., but that he left the file at his place of business. He believes that file may contain this document. Over two months ago, we asked counsel for Jefferson Marketing to determine if such a file does exist, and if so to provide it to us. As noted above, we have been informed by counsel for the Jefferson Marketing Companies that they will no longer voluntarily cooperate with our investigation. We also requested this document from the Helms Committee and the individuals we interviewed who worked for the Committee. While Starling and Moore admit they saw and reviewed the document, they claim that they no longer possess it. Their counsel advised us that the Helms Committee did not have a copy, either.

and coordination of Republican "poll watchers" throughout the state to monitor election day activities in overwhelmingly Democratic precincts which they considered "at-risk."12/

As explained above, the postcard mailing consisted of two separate mailings which employed distinct criteria for selecting the voters to receive the postcard. One mailing of 44,130 postcards was directed exclusively to black voters who had a change of address associated with their name, according to the list acquired from MetroMail, the firm in Chicago which provided such information pursuant to a contract with the RNC. No postcards were sent to the over 220,000 white registered voters who were so identified by Metromail.13/ In light of the fact

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12/ With respect to the "moved voter" mailing, the memorandum specifically recommends that a letter should be mailed "to voters who have moved, but continue voting in the polling place associated with their previous address." Apparently accompanying the memorandum at the time it was provided to Hawke and Pernell were draft letters to the United States Attorneys outlining the proposed "ballot security" activities. One of the activities set forth in the letter was a "Moved Voter Mailing," described as a "mailing to voters who have recently moved informing them of the procedure for voting in their proper precinct on election day." As will be explained below, (see page 16, infra), although it is unclear precisely what Jack Hawke's understanding of the "moved voter" mailing was at the time the memorandum and letters were written and provided to him, his statement to the FBI and statements to the press suggests that at some point prior to the mailing, his understanding of the "moved voter" mailing was different from and more detailed than the description set forth in these materials. In other words, these documents clearly were not the only information he received concerning the postcard mailing program prior to the mailing of the postcards.

13/ MetroMail's list is primarily based upon the national change of address list compiled by the U.S. Postal Service. It also uses lists from certain magazine clearinghouses which store change of address information. Accordingly, unless an individual who has moved has submitted a change of address to the postal service or happens to have changed his address in connection with certain magazines, his name will not appear on the MetroMail change of address list as currently formulated.

Moreover, the change of address information provided by MetroMail to the NCGOP in this case in all probability did not produce an accurate list of voters who were improperly registered. Briefly, MetroMail can only provide its service based upon a benchmark list of names and addresses. In this case, MetroMail was asked to compare its national change of

(continued...)

that race was the only criteria employed to select those voters from the list of voters with a "new" address (an address different from the address contained in the statewide voter registration file provided to MetroMail by the NCGOP), black voters in almost every county throughout the state and of all political affiliations and were sent postcards. Based upon the information we received from MetroMail, approximately three percent of the black "moved" voters were registered Republicans and another three percent were registered Independents. The remainder of the black voters who were sent postcards were registered Democrats.

None of the subjects of our investigation were able to offer any legitimate factual predicate for mailing a postcard addressing voter eligibility and the penalties for election fraud exclusively to all black voters who may have changed residences.

The postcards targeted at black "moved" voters were sent to the "new" address and were mailed bulk-rate on October 29, 1990. They did not include the disclaimer "Paid for by N.C. Republican Party." As explained below, the absence of the disclaimer from this mailing appears to have been a deliberate choice.

The other mailing of 81,446 postcards was targeted at households with at least one registered democrat in 86 selected precincts throughout the State. According to Doug Davidson, the precincts were selected based upon a review of election returns from the 1984 Senate contest between Senator Helms and Democratic challenger James Hunt. Davidson referred to the document which contained such returns as an "abstract" and stated that in addition to reporting the election returns by precinct, the abstract also contained voter precinct-by-precinct voter

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13/(...continued)
address list with statewide voter registration file compiled by the NCGOP. Most of the voter registration information in the NCGOP statewide file submitted to MetroMail was dated from January, 1991. Accordingly, some voters who were identified by MetroMail as having changing residences from the residences under which they were registered to vote may have in fact already submitted their new address to the appropriate county board of elections subsequent to January, 1991 but before the November 6, 1990 election.

In addition, the NCGOP did not request that MetroMail include the date of any change of address that it provided. Thus, in this case, since MetroMail's file contains change of address information dating back as many as nine years, a change of address identified by MetroMail may have reflected a move prior to the move to the residence under which the voter is currently registered.

registration data by race, gender and party affiliation.14/ Davidson asserted that the selection process focused upon those precincts in which Helms fared most poorly in the election, with consideration given to the total numbers of registered voters in each precinct as well. According to Locke's proffer, the racial composition of the precincts was also considered in selecting the targeted precincts. Indeed, as of early 1990, black voters constituted approximately 94 percent of the total number of registered Democratic voters within the 86 targeted precincts.

From the outset, the NCGOP has asserted that the first-class mailing was targeted at precincts with little to no Republican presence. In fact, however, based on Davidson's statements and Locke's proffer, it appears that the party affiliation of poll officials at the respective precincts played absolutely no role in selecting the precincts to target for the mailing. Indeed, Davidson and others told us that they did not believe anyone within the NCGOP or the Helms Committee had ever compiled or attempted to compile such information about the individual precincts.

This mailing was sent first-class with address corrections requested in order to enable those coordinating "ballot security" to collect the names of addressees whose cards were returned and to distribute those lists to precinct officials on election day (see below).

With respect to the mailing program, statements made by Hawke and Pernell to the FBI during our investigation and to the press, although somewhat inconsistent on certain points, reveal that they understood that the mailing would be targeted primarily at black voters, and that the message on the card would address state election law, but may not have known the precise details of the mailing. Hawke stressed during his interview with the Bureau that he had purposefully delegated responsibility for the entire "ballot security" effort to Locke because of all of his other campaign commitments and thus did not maintain close contact with Locke during the final weeks of the campaign. Indeed, Hawke told the FBI that once he had Locke as a consultant, he "let Locke run with the mailing program." Davidson's testimony supports Hawke's characterization of his relationship with Locke as Davidson

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14/ Amy Starling, however, identified the document that was apparently referenced to select the precincts as an abstract of the election returns from the 1988 Presidential contest between George Bush and Michael Dukakis. Starling confirmed that the abstract utilized for "ballot security" purposes contained registration data reported by race and party affiliation. We have outstanding requests of the Helms for Senate Committee and the Jefferson Marketing Companies to determine if this abstract is in their possession, and if so, to provide it to us.

asserted that Locke had been authorized to conduct the "ballot security" program based on his own judgment without detailed directions from Hawke and others at the NCGOP.15/

15/ Davidson's testimony suggests that the Helms for Senate Committee also felt that they had some type of relationship with Locke and they too decided to defer to Locke's judgment with respect to the "ballot security" program. The following exchange took place during our interview:

> Rosenbaum: Who was responsible for keeping the Helms for Senate Committee apprised of what was going on in terms of ballot security?
>
> Davidson: I talked to Statt Moore, who was the campaign manager, and I talked to Carter Wrenn, who was a consultant, not a lot on this issue, because at this time we were very busy. It was like--I want to say three weeks prior to the election. And I think that they felt like Ed was a--you know a good consultant who had done this kind of work before in the past and we would go with his judgment on the program.

While Hawke's claim that he and thus the NCGOP delegated full authority to Locke to conduct the "ballot security" program is fairly credible, such a claim by the Helms for Senate leadership lacks the same indicia of credibility. In this regard, we have several discrete pieces of information suggesting involvement in or knowledge of Locke's activities and decisions with respect to "ballot security" in general and the postcard mailing in particular. Specifically, Davidson, who, as will be seen below acknowledges personal involvement in the targeting criteria and participation in discussions concerning the text of the mailing, testified in the exchange above that he kept Carter Wrenn and Peter Moore apprised, at least to a certain extent, of the ongoing "ballot security" work, and later testified that during the campaign he met with Wrenn and Moore on a daily basis to discuss the progress of all facets of the campaign. Moreover, as Wrenn confirmed, Wrenn was one of the primary individuals, if not the primary individual, responsible for reviewing and authorizing all political mailings for Senator Helms. Wrenn and Peter Moore both essentially confirmed the close working relationship between themselves and Davidson, but nevertheless denied that they had any knowledge of the specific details of the

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The precise chronology of events and the involvement of particular individuals is less clear after Monday, October 22, as we have received a good deal of conflicting testimony. Nevertheless, we have some basis to reach conclusions about the process that led to the postcard mailing at issue.

Apparently, after the meeting with Pernell and Hawke, Locke and Davidson engaged in further discussions concerning the details of the postcard mailing. While we are not certain at what level of specificity the two men discussed the text of the mailings, we do know that prior to the mailing, Davidson understood that Locke contemplated producing two separate mailings;16/ moreover, we are certain that Locke and Davidson

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15/(...continued)
"ballot security" program or in particular, of the postcard mailing prior to news accounts of the mailing.

16/ The uncertainty regarding their discussion of the text stems from the conflict between Davidson's testimony and Locke's proffer on the subject. Davidson claims that at the time he and Locke were discussing whom to target with the mailings, he understood that the two separate mailing would include two distinct messages: One mailing addressing voter residency requirements was to be directed at black voters who may have moved, and the other mailing containing a generic message urging support for Helms and/or the GOP was to be sent to Democrats in the selected precincts in which Senator Helms fared most poorly in his 1984 re-election effort. Davidson testified that when discussing the first mailing, Locke specifically mentioned the transfer ballot procedures that permit voters who have moved to another precinct within the county but not reregistered to vote on election day, and that Davidson assumed that some explanation of this procedure would be included in the mailing to black moved voters.

With respect to Davidson's alleged understanding of the text of the "moved voter" card, while it is likely true that Davidson, Locke and possibly others knew of and discussed the state transfer ballot procedures, as suggested by the text of the card itself, (see Discussion Section below), Davidson is not credible when he asserts that he understood that a mailing aimed at black voters was to include an accurate explanation of these procedures. If the aim of the mailing was to let "moved voters" know that many of them could vote, and to outline the procedures for voting, one would expect the focus of the mailing to be "moved voters" who were likely to vote for Helms. Instead, Davidson posits that the NCGOP in the last weeks of the campaign decided to spend several thousand dollars to advise the group of

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collaborated to some extent on the targeting criteria that would be employed for the two mailings. Indeed, Davidson confirmed during his interview that he specifically approved of the decision to send the "moved voter" mailing only to black "moved voters," and that although Locke ultimately chose the precincts to target for the precinct-based mailing, Davidson knew at the time that Locke was going to select those precincts with primary consideration given to the number and percentage of Democratic voters in a precinct and the prior level of support for Helms. Locke's proffer reveals that the racial composition of the precinct also played a primary role in the selection process for the first-class mailing.

In addition, we know that Davidson personally instructed a computer programmer for Comp., Inc., to create a computer tape containing the address labels for all black "moved voters." Davidson also oversaw the computer work for the first-class mailing. The document identifying the precincts to be targeted for the first-class mailing was delivered to a computer programmer by Amy Starling.

At some point between October 22 and 24, Davidson and Locke spoke to an account representative at Discount Paper Brokers, Sheila Talton, to coordinate the actual production of the postcard mailing. Davidson claims that this brief meeting with Talton and Locke marked the last personal involvement in the postcard mailing until his participation in the sorting of returned postcards during the week prior to the election (see below).

Either during the foregoing meeting or a later encounter, Locke was informed by Talton that if he wanted to mail the cards by October 26, she would need a draft of the text immediately. At that point, according to Locke's proffer, Locke went to an office belonging to the Helms Committee and, using the State Elections Code as a reference, drafted the text of the card.

While Locke's proffer suggests that this was the first and only time he devoted any attention to language that would be on the card and to state law governing voter eligibility for moved

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16/(...continued)
voters most likely to vote for Democrats that may be entitled to vote even though they have moved.

As to his alleged understanding of the second card, his statements appear to conflict with Locke's proffer and other individuals' testimony. Absent Davidson's statement, the evidence indicates that only one message was contemplated for both cards.

voters and the questions posed to voters when they present themselves to vote, other evidence belies such a suggestion.

Most importantly, Johnnie McLean, the assistant to the Director of the State Board of Elections has told us that Ed Locke visited the Board's office prior to the mailing of the postcards and that she and Locke discussed the transfer ballot provision in the North Carolina Elections Code at that time. In fact, she recalls showing Locke the transfer ballot provision in the Elections Code. She also recalls Locke discussing a sign that he had seen in Mecklenburg County at a past election, which was placed at the polling place and contained similar language to the criminal penalties provision included in the postcard. Locke commented that he believed this type of postcard made people "stop to think." Davidson's testimony that Locke discussed the transfer ballot provisions with him prior to the drafting of the card also conflicts with Locke's suggestion that he had not meaningfully considered the relevant provisions of state law prior to actually drafting the text during this short period.

In addition, a letter drafted by Locke, which contained accurate information regarding the questions posed to a voter upon presenting himself to vote, was mailed only a few days after the postcard mailing. This letter, directed at selected precinct officials across the state (possibly only Democratic officials) accurately advised that a precinct official is only required under state law to ask a voter's name and address. Moreover, while this mailing also included an incomplete statement concerning voter residency requirements, the statement in the letter differs from the postcard version of the law and appears to be a less threatening formulation. All of the evidence set forth above creates the strong impression that the drafting of text of the postcard was a far more deliberative process than Locke's proffer intimates.

After having the text typed by a Jefferson Marketing employee, Locke gave the draft to Talton. The typed draft provided to Talton by Locke was typewritten in all capital letters, but included handwritten instructions to the artist to boldface the caption "Voter Registration Bulletin" and to use lower case letters where appropriate. The typewritten draft did not include the disclaimer "Paid for by N.C. Republican Party."17/

17/ The circumstances surrounding the absence of the disclaimer on the bulk-rate postcard and the presence of the disclaimer on the first-class postcard has been the subject upon which we have received the greatest degree of conflicting testimony. We have been told by Jack Hawke that the absence of a disclaimer was a printing error and was not included in only ten percent of the

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While we do not know who reviewed this typewritten draft, we know that while the text that appears on the final version of the card is the same as in the draft version, the final version has different markings than appeared on Locke's typed draft Specifically, one of the critical sentences of the text, "You must have lived in that precinct for the precious thirty days, or you will not be allowed to vote," is underlined in the final version of the text, but not in Locke's draft. Additionally, several letters which are capitalized in the final version were accompanied by no such instructions on Locke's draft.18/

17/(...continued)
cards. Sheila Talton provided us with 45 minutes of internally inconsistent testimony concerning the disclaimer in which she essentially stated that a miscommunication that occurred between herself and the printer led to the omission of the disclaimer on the bulk-rate card.

The most reliable testimony, obtained from the president of the printing company, directly contradicts the statements offered by Hawke and Talton on the subject. Roger Jones, President of Bedford Printing, provided us with the artwork for the bulk-rate card received from Discount Paper Brokers, which did not include a disclaimer. In addition, Jones' contemporaneous notes of his telephone conversations with Talton about this printing order reflect that he was specifically instructed not to include a disclaimer on the bulk-rate card. Conversely, his notes reflect that he was instructed to place a disclaimer on the first-class card; the disclaimer was typeset and pasted on the first-class card in preparation for printing by a Bedford printing employee. Moreover, Jones informed us that he never received a complaint from anyone concerning his handling of the postcard printing.

Jones' story is corroborated by Locke's proffer; Locke apparently would tell us that when he gave Talton the draft of the card, he asked if it needed a disclaimer; Talton responded that she did not believe that the mailing required a disclaimer but that she would check with someone else. She later told Locke that she had been advised that the mailing did not require a disclaimer. Locke's proffer does not, however, include an explanation concerning the presence of a disclaimer on the first-class card.

18/ Julie Graw, the former graphic artist for Discount Paper Brokers, who typeset the text and prepared the artwork for the postcard, recalls that Robert Rosser, President of Comp., Inc,, and/or Calvin Kervin, President of Discount Paper Brokers, both reviewed the draft of the text and the draft of the artwork.
(continued...)

Discount Paper Brokers contracted with outside firms to print the card, print the mailing labels, affix the labels to the cards, and sort the cards in preparation for mailing. Talton personally arranged for the printing of the card as well as the attachment of the mailing labels to the cards and the sorting of the cards. Talton, did not, however, contract for the printing of the labels themselves. We specifically requested the Jefferson Marketing Companies to identify the individual(s) responsible for this phase of the project over one month ago, but they have yet to respond to our request.19/

As noted above, approximately 16,000 first-class postcards were mailed from the Raleigh Post Office on October 26 and 44,130 bulk-rate cards and 64,000 first-class cards were mailed on October 29.

After the mailing of the cards, attention turned to the sorting of the returned first-class cards for use on election

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18/(...continued)
Moreover, she recalls receiving a marked-up draft of the artwork from which she was instructed to make corrections. She believes that the corrections included only punctuation and capitalization changes. Graw does not know who made the corrections on the artwork draft, but noted that, as a general rule Carter Wrenn and Tom Ellis, an attorney with Maupin, Taylor, Ellis & Adams, generally reviewed and made the final corrections to political mailings during the campaign and that these two individuals were in Wrenn's office within the Helms for Senate Committee headquarters at the time she prepared the artwork. As noted above, Wrenn denies any knowledge of or participation in the postcard mailing. We did not speak with Ellis as we were provided with no reliable information connecting Ellis to the postcard mailing. Although Graw appears fairly credible, her testimony is clouded to some extent by the fact that she specifically recalls preparing the artwork for the postcard from a handwritten text rather than the typed text; such a claim does not comport with Talton's explanation of the production of the letter.

19/ The President of Management Data Systems, the outside firm who has been identified as the outfit who printed the labels, told the Bureau that he did in fact produce the labels for the postcard mailing and that Calvin Kervin placed the order and served as his sole contact at Discount Paper Brokers. The documents that we have obtained also suggest that Kervin was the primary person responsible for obtaining the address labels for the postcard mailing. Kervin, however, has denied any involvement in the production of the labels.

day. Davidson testified that he and Locke planned to collect the names of all voters whose cards were returned, to distribute the list of voters to the precinct judges in the respective precincts and to request that they ensure that such voters did not cast a fraudulent ballot. Specifically, they envisioned asking the precinct judges to verify an identified voters' address, and to instruct that person concerning the procedures for voting if he in fact no longer lived within the precinct.20/

To accomplish this task, they solicited assistance from several employees of the Jefferson Marketing Companies and volunteers and employees of the Helms Committee. Beginning around October 30, these individuals began sorting the returned first-class cards by precinct and the computer programmers matched each returned card with an identification number to enable the efficient printing of voter lists. The processing of the returned cards continued until November 2. On that date, Farr advised us in response to the initiation of our investigation that he had recommended that the efforts to compile voter lists for use on election day be abandoned. No lists of voters based upon the returned cards were ever generated.

Also during the week preceding the election, an attempt was made to resend several thousand first-class cards directed primarily to black voters in Mecklenburg County which had been erroneously addressed. Apparently, on October 29 or October 30, persons at Jefferson Marketing and/or Helms for Senate were notified that the post office in Charlotte had retained possession of several thousand postcards that contained faulty addresses. On October 31, a computer programmer for Comp, Inc. corrected the computer programming error that had caused the printing of the erroneous addresses. On the same day, new address labels along with a copy of the postcard were sent to a mailhouse in Charlotte with instructions to retrieve the unmailed cards from the Charlotte post office and to affix the new labels to the cards. Information obtained by the Bureau reveals that Calvin Kervin coordinated this effort.21/ Kervin's participation is especially significant since Kervin did not disclose his involvement to us when we asked about his participation in the postcard mailing after the initial mailing of the cards. In addition, the timing of this effort is particularly telling since

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20/ This strategy for challenging voters was apparently undertaken in response to the amendment to state law governing election day challenges, which precludes the use of a returned mailing as evidence of invalid registration for challenging a voter. See footnote 6, supra.

21/ The information obtained by the FBI is corroborated by receipts obtained from the NCGOP which shows that Kervin ordered the reprinting of the address labels for the postcard mailing.

the press accounts questioning the accuracy of the postcard text had already surfaced at the time an attempt was made to remail the Mecklenburg County postcards. In the end, the cards were not remailed as the Charlotte mail operation was unable to retrieve the cards from the post office.

On October 31, Hawke held a press conference in which he was barraged with questions concerning the postcard mailing. He expressly claimed responsibility for the postcard and stated that the postcard was one component of the NCGOP's ballot security program to ensure a fair election. At the press conference, he explained that the mailing had been directed at moved voters in heavily Democratic precincts.

Apparently immediately after the press conference Hawke called Carter Wrenn to inform him that he had just been barraged with questions concerning the text of the postcard and the selection criteria for the cards. Wrenn claims that he then telephoned Alex Brock, Director of the State Board of Elections, to solicit his opinion concerning the text of the postcard. According to Wrenn, Brock explained the transfer ballot procedures to Wrenn and told him that the card was "ambiguous" and could have been clearer. As noted above, subsequent to this conversation, Brock issued a press release and told the FBI he did so to "neutralize and clarify" the "inaccurate" information contained in the second paragraph of the postcard.

According to Locke's proffer, Hawke contacted Locke on October 30 or October 31 to inquire about the postcard mailing. Locke's proffer, however, does not provide the details of this conversation.22/

In spite of Brock's statements to Wrenn, Hawke's conversation with Locke, and the extensive press coverage of the mailing, neither the NCGOP nor the Helms Committee issued any statement clarifying the postcard or disassociating their organizations from the text of the card or the targeting criteria that had been employed to select the voters who were sent postcards. In fact, the NCGOP continued to take responsibility for the card and defend the mailing as a valid part of its "ballot security" program.

As to other "ballot security" activities prior to and during the election, on November 5, Locke held a meeting with individuals scheduled to serve as GOP observers in the polling places and advised them not to challenge any voters in light of

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22/ Significantly, neither Hawke nor any other subject with whom we have spoken has claimed that he was misinformed by Locke concerning the postcard mailing subsequent to the actual mailing of the postcards.

the NCGOP's pledge to the Justice Department concerning election day challenges.23/ During our coverage of the election in Raleigh, we were informed of no voter challenges by NCGOP election workers.

In addition, Locke apparently was never admonished by the NCGOP or Helms for Senate with respect to the mailing. In fact, he was paid in full for his services subsequent to the November 6, 1990 election. Moreover, Davidson told us that when he last spoke to Locke soon after the election, they exchanged congratulatory wishes for their contributions towards Senator Helms re-election.

E. Impact on Voters

Predictably, many voters who received bulk-rate postcards were confused and frightened by the message. The directors of the county boards of elections in Durham, Guilford (Greensboro) and Mecklenburg (Charlotte) counties, areas in which significant portions of the targeted voters resided, informed us that they were inundated with phone calls from concerned voters who received the postcards. They reported that several callers clearly sounded upset and confused about the information contained in the card. They emphasized that several of the callers that seemed particularly disturbed about the card believed that the bulk-rate card (the edition without the disclaimer) had originated from the county board of elections office. They further noted that virtually all of the callers were in fact eligible to vote either by virtue of the fact that had moved within the county or that they still lived at the address under which they are registered.

Black elected officials and community leaders also stated that they were contacted by several voters who expressed a great deal of distress concerning the message on the card. E. Pearlman (B), a member of the Forsyth County Board of Commissioners, advised us that she received numerous phone calls from voters in her district concerning their eligibility to vote in the November 6, 1990 election. She quoted one woman as telling her "I want to go vote, but don't want to go to jail." She said she advised this woman, who had changed residences within Guilford County, as well as others eligible to vote, that the card was an attempt to intimidate them and discourage them from participating in the election.

23/ Locke was referring to the pledge which you had secured from Tom Farr on November 5, 1991, that the NCGOP would not use the returned postcards as a basis to challenge voters on election day.

Our own contacts with black voters who received the bulk-rate card also reveals that at least some of these voters were frightened by the card, and had they not been provided accurate information prior to the election, may not have participated. For example, Julia Vaughan (B), a registered voter in Durham County, who had changed residences within the county but had not yet reported the change to the board of elections, stated that she was disturbed upon receiving the postcard and was concerned that she would not be able to participate in the election. Indeed, she claimed that she was so upset that she had difficulty sleeping that evening. The next day she contacted the Durham County Board of Elections and was informed that she was in fact eligible to cast a transfer ballot.

Another registered voter Mary Clark (B), stated that although she was not concerned that she would be ineligible to vote upon receiving the card, the section of the card describing the questions that would be asked voters caused her some concern that she may be asked more questions than usual at the polls.

Most of the voters with whom we spoke who received first-class cards were black elected officials and thus viewed the cards as a crass attempt to intimidate black voters. Several of the officials, including State Senator James Richardson (B), stated that less sophisticated voters and elderly voters who have personally lived through the period of black disenfranchisement and state-sponsored discrimination at the polls may well have been intimidated by the mere receipt of a card that warns of criminal penalties in connection with voting. According to the Charlotte Observer of November 1, 1990, Ernie Thurston (B), a precinct official from Asheville, expressed similar sentiments concerning the likely impact of the postcard. Thurston remarked that the cards "would discourage elderly voters, new voters, and people who don't vote regularly." In sum, the black community leaders with whom we spoke emphasized that this type of mailing, which makes a reference to criminal penalties in connection with voting, may create fear in the most vulnerable of black voters, and without active intervention to dispel those fears, may ultimately dissuade some of these voters from participating in the electoral process. Indeed, your press statement on November 5, 1990, in which you labeled the postcards "misleading, if not totally inaccurate," and you announced the assignment of Department attorneys to monitor election day activities likely dissipated the most serious negative potential of the postcard--keeping eligible black voters from participating in the electoral process.

III. Discussion

The foregoing information demonstrates that those individuals and organizations responsible for the postcard

mailing engaged in an act of intimidation of voters and threatened voters in the exercise of their voting rights. Such conduct violates both 42 U.S.C. 1971(b) and Section 11(b) of the Voting Rights Act, 42 U.S.C. 1973i(b), civil statutes which prohibit non-violent voter intimidation.

The former statute is part of the Civil Rights Act of 1957, and prohibits intimidation, threats, or coercion, as well as attempts of such conduct, "for the purpose of interfering with the right" to vote for candidates in federal contests. Section 11(b) includes similar language to that of 42 U.S.C. 1971(b), except that, Section 11(b) does not include the requirement that the intimidation, threat or coercion be for "the purpose of interfering with the right to vote" and it does not explicitly confine the terms of the statute to federal contests. The language of the statute and its legislative history reveals that Section 11(b) was enacted in large part to ease the Government's burden in prosecuting voter intimidation claims by removing the necessity to prove subjective purpose to intimidate, threaten, or coerce in order to prove claims of non-violent voter intimidation, threats or coercion. I shall discuss in turn the legal standard governing each statute and the facts which satisfy the applicable standards.

A. 42 U.S.C. 1971(b).

The foregoing information demonstrates that those individuals and organizations responsible for the mailing have violated 42 U.S.C. 1971(b). This section provides:

> No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten or coerce," any person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions, at any general, special, or primary election held solely or in part for the purpose of selecting or electing any such candidate.

42 U.S.C. 1971(b).

1. The Legal Standard

The threshold question that must be addressed under section 1971(b), is whether a sufficient nexus between the proscribed

conduct and a federal election contest can be established to proceed under the statute. This jurisdictional prerequisite is clearly satisfied. The postcard mailing had the potential to affect federal elections throughout the state since it was addressed to the qualifications for casting a ballot for any candidate, including candidates for federal office. See generally United States v. Bruce, 353 F.2d 474 (5th Cir. 1965) (1971(b) held applicable without inquiry of connection with federal contest where white landowners engaged in economic coercion by preventing black insurance agent involved in voter registration efforts from entering onto property to engage in business transactions with black sharecroppers who lived and worked on landowners property); United States v. Beaty, 288 F.2d 653 (6th Cir. 1961) (white landowners and white-owned businesses conspiring to exert economic pressure on black sharecroppers for attempting to register to vote found in violation of section 1971(b) without inquiry into impact on federal election). (Ku Klux Klan enjoined from engaging in pattern and practice of intimidation, threats and coercion against black citizens for attempting to register to vote and exercising other constitutionally protected rights).

With respect to other threshold elements under section 1971(b), some courts have held that section 1971(b) applies only in those circumstances in which the alleged intimidation, threat or coercion is racially motivated. See e.g. Brooks v. Nacrelli, 331 F. Supp. 1350, 1352 (E.D. Pa. 1971), aff'd 473 F.2d 955 (3d Cir. 1973); Gremillion v. Rinaudo, 325 F. Supp. 375, 378 (E.D. La. 1971); Cameron v. Johnson, 262 F. Supp. 873 (S.D. Miss. 1966). These decisions appear to be predicated on the belief that Civil Rights Act of 1957 was passed to enforce the constitutional guarantees of the Civil War Amendments (Thirteenth, Fourteenth, and Fifteenth), and that consequently, the scope of the statutes should correspond with the main purpose of the amendments--the eradication of racial discrimination.

There is a good deal of doubt concerning the correctness of confining section 1971(b) to racially motivated conduct, especially in light of the clear reference in the House report accompanying the Civil Rights Act of 1957 to Congress' power under Article I, Section 4 of the Constitution to regulate federal elections, a power independent of its authority to enforce the Civil War Amendments. See Original Knights of the Ku Klux Klan, 250 F. Supp. 330, 334 (E.D. La. 1965).

We need not persuade a court on this issue, however, in order to proceed under section 1971(b), because we can show that the conduct at issue was racially motivated. With respect to the bulk-rate mailing, within the group of approximately 260,000 "moved voters" known to the prospective defendants, only the 44,000 black voters were selected to receive postcards. As to the first-class cards, the prospective defendants sent the

postcards to Democratic households in 86 precincts, with the clear knowledge and understanding that black voters constituted over 90 percent of the registered voters in these precincts cumulatively. The primacy of race in the selection criteria clearly places the postcard mailing scheme within the scope of a statute which reaches only racially motivated conduct.24/

In addition to the apparent requirement of proof of racial motivation, proof of essentially two ultimate facts are required to prevail under section 1971(b): "(1) that there was an intimidation, threat, or coercion, or an attempt to intimidate, threaten or coerce, and (2) that the intimidation was for the purpose of interfering with the right to vote." United States v. McLeod, 385 F.2d 734 (5th Cir. 1967) (quoting United States v. Board of Education of Greene County, Mississippi, 332 F.2d 40, 46 (Rives, J., concurring)).

A review of the caselaw suggests that we can successfully establish that the prospective defendants in this case engaged in an act of intimidation of black voters and threatened such voters for the purpose of interfering with the right to vote.25/ With respect to the act of intimidation, there are no cases under section 1971(b) which provide a working definition for the term "intimidate." However, cases arising under other federal statutes which contain the term "intimidation" provide useful

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24/ As we established in Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990), cert. denied, 111 U.S. 681 (1991), proof of racial animus is not necessary to establish purposeful racial discrimination under the Equal Protection Clause of the Fourteenth Amendment or the Voting Rights of 1965, as amended.

25/ Although allegations of intimidation and a threat in this case are appropriate, I devote the great majority of the analysis which follows to the allegation of intimidation. I do so partly because it is awkward to repeat the two terms throughout the memorandum but also in part because the case law provides a definition of intimidation which is clearer and is more applicable in the nonviolent context (see below) than any definition provided for the term "threat" in the context of the several federal statutes which use the term. Notwithstanding the disproportionate attention devoted to the term "intimidation," the actions undertaken certainly can be characterized as an unlawful "threat" as that term is commonly understood and thus should be alleged in our complaint. To establish that the postcard constituted a "threat," which is defined in Webster's Ninth New Collegiate Dictionary as "an expression of intention to inflict, injury, evil, or damage," we will want to focus upon the purpose and reasonable effect of the inclusion in the postcard of the sentence outlining federal criminal penalties for providing false information to election officials.

authority that can reasonably be relied upon in construing "intimidation" in this context.

At least two courts have construed the term "intimidation" in the context of 18 U.S.C. 2113(a) the federal bank robbery statute. In United States v. Baker, 129 F. Supp. 684, 685 (S.D. Ca. 1955), the court essentially held that the term "intimidation" means "putting in fear." Relying on Baker, the Fifth Circuit similarly found in United States v. Jacquillon 469 F.2d 380, 385 (5th Cir. 1972), cert. denied, 410 U.S. 938 (1973), that as used in section 2113(a), intimidation means "to make fearful or to put into fear."

The First Circuit further refined the definition of "intimidation" announced in Baker and Jacquillon in United States v. Norton, 808 F.2d 908 (1st Cir. 1987), a case involving 18 U.S.C. 844(d), which prohibits the interstate transportation of explosives "with the knowledge or intent that it will be used to kill, injure, or intimidate any individual." The court in Norton reversed the defendant's conviction on the grounds that the jury had been erroneously instructed that the term "intimidation" means "to scare or frighten a person for an improper purpose." The court held that a proper instruction on "intimidation" under 844(d) must include the notion that the act to scare or frighten be designed to "affect future conduct." Id. at 909.26/

In reaching this conclusion, the court stressed that a definition which requires "putting in fear" designed to affect future conduct is consistent with the dictionary definitions of the term. Webster's Third New International Dictionary, for example, defines "intimidate" as "to make timid or fearful; inspire or affect with fear; esp. to compel to action or inaction (as by threats). Id. at 910. The court also noted that its interpretation of "intimidate" comports with Baker and Jacquillon

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26/ This issue arose in a bizarre context. The defendant, Norton, angered by the theft his radar detector from his car, decided to lay a trap for the next unsuspecting thief by placing a fake radar detector in his car that would explode and spray indelible ink when plugged into a socket. As Norton expected, someone indeed stole the fake detector, but before having an opportunity to use it, the thief was apprehended by the police and the detector was retrieved. However, the police officer tested the detector in his car upon its retrieval, at which point the detector exploded, inflicting the officer and his passenger with fairly serious injuries. Norton claimed at trial that in setting up the trap, he did not intend to hurt anyone nor affect the thief's behavior in any way; he simply intended to scare or frighten the thief. Thus, the question whether "intimidate" must include the desire to affect future behavior was critical in the case.

since "coercion was inherent in the conduct charged" in those cases. Id. at 911.

Most significantly, the court reviewed all other criminal statutes in which the term "intimidate" appears, including 18 U.S.C. 594, the criminal counterpart to 42 U.S.C. 1971(b), and "found no instance in which interpreting that word to include the notion of affecting conduct would be inconsistent with the relevant statute's intent." Id. at 910. The First Circuit is certainly correct on this point with regard to 18 U.S.C. 594, and thus 42 U.S.C. 1971(b) as well, as the statutes' sole concern is to proscribe conduct that would affect another's future conduct, i.e. the exercise of the franchise. Thus, interpreting "intimidation" under section 1971(b) to mean putting in fear, making timid, or frightening in order to interfere with or deter the exercise of the franchise appears consistent with the precedent construing and with the purpose of the provision.

The case law suggests that there are at least two possible approaches to establishing that an act of intimidation has occurred: (1) showing that the alleged misconduct was undertaken with an intent to intimidate, Jacqillon, supra at 382 ("proof of actual fear is not required in order to establish intimidation"); (2) establishing that the alleged misconduct had an intimidating effect on the targeted individuals, see McLeod, 385 F.2d 734, 740-41 (5th Cir. 1967) (finding that baseless arrests and prosecutions of blacks constituted acts of intimidation based upon clear coercive effect of such conduct). The evidence relied upon to establish the purpose to intimidate will also prove the second prong of section 1971(b) in this case--that the act of intimidation was undertaken for "purposes of interfering with the right to vote"--since the postcard mailing is confined exclusively to the subject of voting rights and thus the intimidation can be motivated by no other reason other than to interfere in the right to vote.

2. Evidence of Intentional Intimidation

A confluence of factors demonstrates that the postcards were intended to instill fear and confusion in the black voters targeted to receive the cards concerning their right to cast a ballot on election day in order to achieve the ultimate objective of decreasing black voter turnout on election day.

a. The postcard text

The language on the card is of course of primary importance in considering the intent behind the mailing of the card. Here, the fact that the card contains inaccurate and incomplete statements of the law coupled with a statement setting forth the maximum federal criminal penalties for providing false information to an election official is probative of an intent to

frighten and confuse the recipients of the cards and ultimately to dissuade them from casting a ballot.

Again, the card contains an inaccurate and misleading statement regarding a registered voter's right to vote in an election where the voter has moved from the precinct in which he is registered. Contrary to the statement on the card--"you must have lived in [the precinct in which you are registered] for at least the previous thirty days or you will not be allowed to vote"--a registered voter in North Carolina may be able to vote even if he has not lived in the precinct in which he is registered for thirty days preceding the election. If the voter has removed from the precinct in which he is registered more than 30 days before the election, but moved to another precinct within the same county, then the voter can avail himself of the transfer ballot procedures in place in every county and cast a ballot. If the voter has removed from the precinct in which he is registered within thirty days of an election, he is authorized under state law to cast a ballot in the precinct in which he is registered.

As noted above, the card also contains misleading statements concerning the inquiries that will be made of voters when they present themselves to vote. State law provides that a poll official ask a voter's name and address, not period of residence, and several election officials with years of experience in the administration of elections have told us that they know of no jurisdictions which instruct their poll officials to ask a voter the length of time such voter has lived within the precinct.

The inaccurate and misleading statements must be considered against the backdrop of the warning on the card that providing false information constitutes a federal crime "punishable by up to five years in jail." It is this combination that creates a strong inference that those responsible for the card desired to instill fear and doubt into the minds of the targeted voters concerning their right to vote on election day and the interrogation they will be subject to at the polls if they attempt to cast a ballot.

Reinforcing the inference created by the language itself is evidence that the drafter(s) of the card, Ed Locke and possibly others, knew that the card was false and misleading when they drafted the card. We need look no farther than the text itself for such evidence. The first line of the postcard states: "If you moved from your old precinct over thirty days ago, contact the County Board of Elections for instructions for voting on Election day." This statement clearly reflects that the drafter(s) knew that in the State of North Carolina, voters who have moved outside of their voting precinct more than thirty days before an election, may nevertheless be able to vote in that election. Such knowledge is corroborated by the testimony of Doug Davidson, who testified that he and Ed Locke discussed the

transfer ballot provision under state law prior to the drafting of the card and by the testimony of Johnnie McLean, who told us that she and Locke discussed the transfer ballot provision in the North Carolina Elections Code. In fact, she recalls showing Locke the transfer ballot provision in the Elections Code. The conclusion that Locke knew of the existence of transfer ballot procedures is further underscored by the description in the draft letter to U.S. Attorneys which accompanied the October 22, 1990 memorandum from Locke to Hawke. In the draft letter apparently produced by Locke, the proposed "moved voter mailing" is described as a mailing to "voters who have recently moved informing of the procedure for voting in their proper precinct on election day." Inherent in this description is an acknowledgement that a procedure exists for moved voters to cast a valid ballot on election day.

In addition, we have some evidence that the card was reviewed by a lawyer and campaign officials presumably familiar with state election law. Robert Hunter, an attorney in Greensboro and former Chair of the State Board of Elections, advised us that Locke told him during a conversation concerning the propriety of the card that the card had been reviewed by an attorney before being mailed. Moreover, we have some information that suggests that individuals within the Helms campaign and/or principals of the Jefferson Marketing Companies reviewed the card and made some changes prior to the mailing of the card.

Of equal significance is the fact that at least one executive of the Jefferson Marketing Companies was directly involved in attempting to resend erroneously addressed first-class postcards to residents of Mecklenburg County on October 31 and November 1, a time period contemporaneous with the initial press accounts and inquiries concerning the accuracy of the text of the card. Thus, whatever the extent of any individual's involvement in the drafting or review of the card, anyone involved in the attempt to resend the cards on October 31 certainly knew that the card contained inaccurate information, or at a minimum, knew serious concerns had been raised regarding its accuracy.

In addition to the evidence that the drafter(s) knew they were disseminating false information through the postcard, we also have information which suggests that the drafter(s) included the provision concerning criminal penalties specifically to heighten the fear and apprehension of the targeted voters concerning their exercise of the franchise. There is evidence that Locke, apparently the individual primarily responsible for the language on the card, understood the likely effect of the inclusion in the card of a warning concerning federal penalties for giving false information to an election official. As noted above, according to Johnnie McLean, administrative secretary at the North Carolina State Board of Elections, Locke spoke to her

concerning a sign he had seen outside of a polling place in Mecklenburg County which contained similar language to the federal penalties provision included in the postcard, and commented that the sign made people "stop to think." Locke's statement to McLean strongly suggests that the card was intended to instill fear and apprehension in the minds of black voters concerning their right to vote in the November 6 general election. The foregoing information presents a fairly compelling case that those individuals primarily responsible for the postcard mailing knew at the time the card was mailed (and remailed) that it was not an accurate reflection of the law regarding the rights of certain voters to cast a ballot in the election.

The apparently deliberate choice not to include a disclaimer on the bulk-rate card is also probative of an intent to frighten black voters concerning their right to cast a ballot. Without a disclaimer, the postcard, as the designers certainly anticipated, was reasonably viewed as a card from a governmental entity. This perception undoubtedly increased the legitimacy of the card in the eyes of the targeted voters and thus likely created heightened fear and concern about their eligibility to vote. It is reasonable to assume that the designers of the card understood that the absence of a disclaimer would increase the legitimacy of the card in the eyes of many of the targeted voters and thus would enhance the likelihood that such voters would be dissuaded from participating in the election.

b. Targeting Criteria

The targeting criteria employed for both sets of cards are suggestive of an intent to intimidate and threaten or otherwise interfere with the voting rights of the targeted recipients.

(1) Bulk-Rate Cards

As outlined above, the bulk-rate cards were sent exclusively to the black voters who had a change of address associated with their name (18.8% of the total number of voters identified as having a "change of address"), and were sent to the voters' "new" address.27/ Doug Davidson confirmed that no other factors, such as the geographic location from which the voter had apparently

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27/ I place "new" in quotations since given the fact that MetroMail, the firm which provided the NCGOP with the address changes, maintains change of address information for as long a nine years, it is conceivable that the address change provided by MetroMail predates the address contained in voter registration files. In any event, the NCGOP and others clearly operated under the assumption that the address change provided by MetroMail was more recent than the address within the registered voter files.

moved, were considered in selecting the voters to receive the cards. Consequently, tens of thousands of black voters targeted to receive cards were in fact eligible to vote under the state's transfer ballot procedures, assuming they lived at the "new" address at the time of the election. Specifically, our analysis reveals that anywhere from 22,000 to 31,000 of the 44,000 targeted voters had moved within the county in which they were registered.28/ It is likely that this is the group of black voters that the decisionmakers were particularly interested in reaching, since voters who moved within the county are the most likely group to attempt to vote at their "old" polling place.

In addition, since the cards were sent to the voters' "new" addresses, the decisionmakers clearly had a desire for the group of voters who were likely eligible to vote on election day to receive the card. Given the text of the card, this undoubtedly reflects a desire to frighten and dissuade eligible voters from casting a ballot on election day.

Moreover, as would be expected from a selection process based only upon race and change of address, the black voters targeted to receive cards resided in every corner of the state, and many were registered to vote in precincts that contained a majority of white voters and a substantial number of registered Republicans. The mailing thus bears no relationship to any alleged concerns expressed by the NCGOP and other involved parties that the Republicans would not have a sufficient presence to combat election fraud in certain "heavily Democratic" precincts in the state.

The primacy of race in the selection criteria is also consistent with a desire to discourage participation in the election. As everyone even remotely involved in politics in North Carolina is well aware, electoral voting patterns in the State of North Carolina are marked by severe racial polarization. Moreover, it is no secret that the overwhelming majority of black voters in the state are registered Democrats, and were likely to vote for Mr. Gantt and for other Democratic candidates throughout the State. Accordingly, if one were interested in decreasing the turnout among voters most likely to vote for Mr. Gantt and other Democratic candidates, one would logically direct such efforts toward the black voters of the State. Indeed, during his interview, Carter Wrenn emphasized the critical importance of turnout in an election and connected "ballot security" measures to the issue of turnout, suggesting that such measures are undertaken when it is believed that those efforts will do an

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28/ We can only generate a range of figures with the available information because approximately 9,000 voters moved within a city that lies within more than one county.

effective job of decreasing the number of votes cast for the opposing candidate.

In short, we have been offered no legitimate factual predicate for the race-based selection of "moved voters" for the postcard mailing. Indeed, it is difficult to conceive of a legitimate justification for a mailing setting forth penalties for voter fraud in which the targeted voters were selected out of a larger pool of similarly situated voters based exclusively upon their race. The exclusivity of race in the selection process is extremely compelling evidence of an intent to intimidate and confuse the targeted voters and to deter their participation in the electoral process.

(2) First-Class Cards

The voters targeted to be sent first-class cards, as you will recall, were apparently chosen based upon the aggregate voter behavior of their precinct in either the 1984 Senate contest between Jim Hunt and Senator Helms or the 1988 presidential contest,29/ the racial composition of their precinct, the number of voters in their precinct and their party affiliation. In other words, the decisionmakers targeted Democrats in precincts in which Helms or Bush fared poorly in 1984 and in which resided a large number of black voters. Not surprisingly, black voters constituted 93.1 percent of the targeted voters for the first-class mailing.

While the presence of race as a primary criteria in this mailing evinces an intent to frighten voters and discourage participation in the election for the reasons suggested above, other factors (or nonfactors) also reveal an unlawful purpose.

The most telling aspect of this mailing, beside its virtual racial exclusivity, is the absence of any nexus between the voters targeted to receive the cards and the alleged concern which motivated the card mailing--the casting of illegal ballots by voters who have moved. Indeed, the decisionmakers had no factual basis for believing that any of the voters targeted for this mailing had moved; they simply directed the cards to every household with at least one registered Democrat within the selected precincts. The absence of a discernible link between the targeting criteria and the election fraud concern which allegedly gave rise to the mailing belies the "neutral" justification for the mailing and consequently leaves a desire to

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29/ The abstract used by the designers of the mailing to analyze the previous election returns contained not only the number of votes cast for each candidate by precinct, but included the racial composition and party affiliation of registered voters by precinct as well.

intimidate the registered voters in the targeted households and discourage participation in the election as the only rational purpose for the mailing.

The fact that the precincts were selected without regard to the political make-up of the poll officials slated to work in those precincts further underscores the unlawful purpose of the first-class card mailing. The mailing cannot reasonably be viewed as a legitimate effort to deter fraud in those precincts with no Republican presence at the polls, as initially suggested by officials of the NCGOP, where no effort was made to identify those precincts. Indeed, our research revealed that several of the targeted precincts were staffed with two Republican poll officials and the great majority of targeted precincts had at least one Republican poll official.30/

Nor can the mailing be viewed solely as an effort to generate a list of moved voters to use as a basis for challenges on election day. While the desire to compile moved voter lists from the returned first-class cards appears to have been one of the driving forces behind the mailing, such a purpose does not explain the inclusion of the particular message on the card.31/ The compilation of a "moved" voter list could have been accomplished by mailing a card which contains a generic message, which is precisely what was done by Locke and others in 1984. The decision to include the threatening message on the card clearly suggests a purpose beyond the compilation of a voter list for use on election day.

c. Other Relevant Evidence

Julie Graw, the art designer for Discount Paper Brokers who typeset the postcard, informed us that several of her supervisors

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30/ Conversely, we identified a few majority white, majority Democratic precincts not among the designated precincts in which the Republicans had no representation among the poll officials.

31/ It is noteworthy that the plan devised to compile a list of voters subject to challenge on election day was fraught with inherent problems that would have inevitably led to the challenge of voters who had taken all of the appropriate steps to register in accordance with the law. Specifically, the voter registration list used as a basis for the first-class mailing contained voter registration information dating back to the early months of 1990. Thus, it is entirely conceivable that a voter who moved subsequent to the date the voter registration information was obtained, and then properly reregistered under his new address, would have been placed on a challenge list since the postcard to the his prior residence would likely have been returned.

and other leaders within the Helms Committee, including Calvin Kervin and Robert Rosser, used racial epithets such as "nigger" in referring to blacks. Additionally, Graw advised us that she frequently overheard Kervin and others using what they considered to be a black dialect when they were discussing blacks in general or the Gantt campaign in particular. Such testimony provides relevant background information to proving that the primary actors in this case intended to intimidate black voters through the postcard mailing.

3. Actual Effect

Evidence that the postcard mailing had an intimidating effect further supports the conclusion that the cards were intended to have such an effect and independently establishes the occurrence of an intimidating act, see McLeod, supra. Here, there is ample evidence that numerous voters eligible to vote in the November 6, 1990 election who received cards were distressed and concerned regarding their eligibility. Such distress can be gleaned from such voters' conversations with board of elections' officials concerning the postcards and their voter eligibility. Information we obtained from black community leaders and from targeted voters also reveals that some voters were frightened by the message of the card and may not have voted had they not obtained correct information prior to the election. Moreover, one can reasonably infer that there were others who never obtained accurate information and thus, although eligible, did not attempt to vote.

In assessing the likely impact of the postcard on the targeted voters, it is critical to consider the history of discrimination against black citizens in the State of North Carolina and the additional vulnerability of black voters to these types of tactics because of the vestiges of discrimination.

It must be remembered that official barriers to the ballot box imposed against black citizens, such as the poll tax and the literacy test, were eliminated in North Carolina only a generation ago. See Thornburg v. Gingles, 478 U.S. 30 (1986). Accordingly, black voters constitute a much greater proportion of recently registered voters. Newly registered voters with less experience in the electoral process, especially those who have vivid memories of the period in which they were barred from participating in the democratic process, would likely be more frightened and disturbed by this postcard. Moreover, the historic discrimination against blacks in education, housing, employment and social services has been found to relate to the lower socioeconomic level of black residents of North Carolina, which in turn has been identified as an impediment to black citizens' ability to participate effectively in the political process. See id. Similarly, this lower socioeconomic status likely creates more vulnerability among the black population as a

whole to being misled and discouraged from voting by this type of mailing.

In short, the vestiges of the long and tortured history of discrimination against black citizens in North Carolina serve to buttress the testimony of several black community leaders--the postcard mailing likely had an intimidating effect on many of the black voters selected to receive the postcard.32/

B. 42 U.S.C. 1973i(b)

Section 11(b) of the Voting Rights Act of 1965, 42 U.S.C. 1973i(b), which also proscribes non-violent voter intimidation, provides:

> No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten or coerce, any person for voting or attempting to vote, or intimidate, threaten, coerce, or attempt to intimidate, threaten or coerce, any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten or coerce any person for exercising any powers or duties under section 3(a), 6, 8, 9, 10, 12(e).

42 U.S.C. 1973i(b).

32/ In addition to alleging an act to intimidate for purposes of the right to vote, we should also allege that the activities constituted an unlawful attempt to intimidate black voters for purposes of interfering with the right to vote. I recommend such a claim because it preserves the section 1971(b) claim in the event that the court finds no actual intimidating effect and also finds that an act undertaken which does not achieve its desired objective is properly viewed as an attempt. Although there is support in the case law for such a view, see United States v. Clark, 249 F. Supp. 720 (S.D. Ala. 1965) ("[t]he success or failure of intimidation, threats or coercion, is immaterial, since attempts are equally proscribed."), I believe it is an incorrect view, since an attempt has been defined traditionally as an inchoate crime, a crime in which not all acts necessary for its completion have been committed. In a circumstance in which all of the acts that are necessary to complete the "crime" have been accomplished, but the desired effect did not occur, it seems appropriate to view that as undertaking a completed act. See Jacqillon, 469 F.2d at 382 ("proof of actual fear is not required in order to establish intimidation"). Nevertheless, we should allege attempt in case the court finds no intimidating effect and chooses to follow the approach taken in Clark with respect to the definition of an "attempt."

1. The legal standard

The legislative history of this provision clearly reveals that Congress intended to broaden the reach of federal voter intimidation laws with the passage of Section 11(b). Indeed, in light of the legislative history, a strong argument can be made that neither proof of a purpose to intimidate nor actual effect need be shown in order to establish a violation of Section 11(b). Rather, the Government need only show that in the particular circumstances the conduct at issue had a tendency to intimidate, threaten, or coerce the reasonable voter. Thus, we may be able to prevail under Section 11(b) in this case irrespective of the ultimate finding concerning subjective intent.

There are very few reported cases under Section 11(b) (we have not identified any case brought by the Justice Department), and of those cases, none engage in any meaningful analysis of the appropriate standard to adjudicate claims of the statute.33/ The legislative history of the Act strongly suggests that a showing of intent to intimidate is not necessary to prove a

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33/ The only case that even makes a passing reference to the standard under Section 11(b) is Olagues v. Russinello, 797 F.2d 1511 (9th Cir. 1986) (en banc), vacated, 108 S.Ct 52 (1987), which was subsequently vacated on mootness grounds. In dismissing plaintiff's claim of voter intimidation by various state officials, the court, citing cases arising under 42 U.S. 1971(b), cursorily asserted that both section 1971(b) and Section 11(b) require a showing of subjective purpose to intimidate. The court clearly devoted scant attention to the voter intimidation claims, as they were not the central claims on appeal.

Not surprisingly, there also exists little case law guidance for determining whether under Section 11(b) a link between the misconduct and a federal candidate must be shown to proceed under the provision and whether the provision only applies to racially motivated intimidation. The absence of any reference to federal contests and the legislative history of the statute suggests that Congress intended that the provision be applicable to all elections, irrespective of the existence of a federal contest. At least one court has raised constitutional concerns regarding Congress' power to reach misconduct in purely local elections. See United States v. Harvey, 250 F. Supp. 219 (E.D. La. 1966). We need not resolve this issue in this case, since as noted above, the requisite nexus to a federal election can clearly be established; thus, the constitutionality of applying Section 11(b) to this set of facts is beyond dispute. We also need not resolve whether racial motivation is an element of Section 11(b) as the instant circumstances demonstrate that such an element would be satisfied as well.

violation of Section 11(b). Indeed, Section 11(b) was proposed by the Justice Department specifically to relieve the Government of the necessity of proving subjective intent to intimidate, a burden that had been required by the courts in intimidation cases brought under the Civil Rights Act of 1957, 42 U.S.C. 1971(b). During hearings before the House Judiciary Committee in March, 1965, Attorney General Katzenbach, explained the reasons for the inclusion of the anti-intimidation provision of the proposed bill, which later became Section 11(b) of the Voting Rights Act of 1965:

> The litigated cases [under 42 U.S.C. 1971(b)] amply demonstrate the inadequacies of current statutes prohibiting voter intimidation. . . .[T]he most serious inadequacy results from the practice of district courts to require the Government to carry a very onerous burden of "purpose." Since many types of intimidation, particularly economic intimidation, involve subtle forms of pressure, this treatment of the purpose requirement has rendered the statute largely ineffective.
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> In our view, section 7 of the bill [later section 11] which prohibits intimidation of persons voting or attempting to vote under the bill represents a substantial improvement over 42 U.S.C. 1971(b). . . .[u]nder the language of section 7, no subjective "purpose" need be shown . . .in order to prove intimidation under the proposed bill. Rather defendants would be deemed to intend the natural consequences of their acts.34/

Voting Rights 1965, Hearings on H.R. 6400 Before Subcomm. No. 5 of the Committee on the Judiciary House of Representatives, 89th Cong., 1st Sess. 11 (1965) (statement of Nicholas Katzenbach, Attorney General of the United States).

The House Report on the Voting Rights Act of 1965 reflected Attorney General Katzenbach's characterization of Section 11(b).

34/ Under 42 U.S.C. 1971(b), it is unlawful to "intimidate, threaten, coerce, or attempt to intimidate, threaten or coerce any other person for the purpose of interfering with the right to vote." (emphasis added). Section 11(b) does not include the underlined language, presumably to effectuate the primary basis for enacting the provision, the elimination of subjective intent as an element in voter intimidation cases.

With respect to Section 11(b), The Report states that "unlike 42 U.S.C. 1971(b) (which requires proof of a "purpose" to interfere with the right to vote) no subjective purpose or intent need be shown." H.R. Rep. No. 439, 89th Cong., 1st. Sess. 32 (1965).

In light of the clear legislative history, it appears that some type of objective standard would best effectuate the Congress' desire to broaden the protective umbrella of federal anti-intimidation laws.

Principles of labor law prove instructive in formulating a standard that accomplishes Congress' apparent designs in enacting Section 11(b). The concept of an objective test to determine unlawful interference with a protected right has been well established in the context of unfair labor practice adjudication under the National Labor Relations Act. Under the Act, it is an unfair labor practice for an employer or union to "interfere with, restrain or coerce employees in the exercise" of their rights guaranteed in the Act, which are essentially to organize, join unions, bargain collectively and strike. See Soule Glass and Glazing Co. v. NLRB, 652 F.2d 1055, 1076-77 (1st Cir. 1981) (quoting 29 U.S.C. 158(a)). The First Circuit in Soule Glass clearly set forth the prevailing standard for adjudicating unfair labor practice claims:

> The elements of [an unfair labor practice] violation are to be determined by reference to an objective text. It is not necessary to show that particular employees felt coerced, etc., or that the employer intended to produce the impermissible effect. . . . Rather, it is sufficient if the General Counsel can show that the employer's actions would tend to coerce a reasonable employee.

Id. at 1077. See also Black Grievance Committee v. NLRB, 749 F.2d 1072, 1075 (3d Cir. 1984), cert. denied, 472 U.S. 1008 (1985) ("Neither direct proof of interference with protected rights nor anti-union animus is necessary to sustain a violation of section 8(a)1, so long as the employer's activity would tend to interfere with, coerce, or restrain a reasonable employee.); Russell Stover Candies, Inc. v. NLRB, 551 F.2d 204, 207-08 (8th Cir. 1977) (illegality of employer's conduct under section 8(a)(1) not contingent upon evidence that employees were in fact coerced); Fun Striders, Inc., v. NLRB, 686 F.2d 659, 662 (9th Cir. 1981) (antiunion motive not essential element of violation of section 8(a)(1)); Huck Manufacturing Co., v. NLRB, 693 F.2d 1176, 1183 (5th Cir. 1982) (NLRB need only draw a reasonable conclusion form the evidence that company's conduct would tend to coerce employees in exercise of protected activities).

Consistent with this approach, several courts have held that "an employer's belief, whether reasonable or unreasonable, is not the determinative factor in deciding whether there has been an interference with employees' rights . . . ." Hughes Properties, Inc., v. NLRB, 758 F.2d 1320, 1323-24 (9th Cir. 1985) (employer's good-faith impression that targets of union organizational effort may have been on-duty employees carried no weight in determination whether unfair labor practice committed); see also NLRB v. Litho Press, 512 F.2d 73, 76 (5th Cir. 1975) (fact that employer may not have known that person he evicted from property for passing out union handbills was in fact employee not relevant to determination whether conduct violated section 8(a)(1)). Thus, a good-faith mistaken belief concerning a relevant aspect of the alleged misconduct does not serve as a defense to an unfair labor practice claim.

Mindful of the fact, however, that many legitimate employer decisions, such as closing operations, may well tend to interfere with employees' protected activities, the Supreme Court has noted that in the absence of an anti-union motive, section 8(a)1 is violated only when the interference with the protected rights outweighs the business justification for the employer's actions. Textile Workers Union v. Darlington Manufacturing Co., 380 U.S. 263, 269 (1965); see also Soule Glass, supra, at 1077 ("[e]mployer conduct that otherwise tends to interfere, restrain, or coerce employees may be held lawful if it advances a substantial and legitimate company interest . . .").

In determining whether a particular action or set of actions violates section 8(a)(1), the factfinder is "to consider the total context in which the challenged conduct occurs and is justified in viewing the issue from the standpoint of its impact on the employees." NLRB v. Okun Bros. Shoe Store, Inc., 825 F.2d 102, 105 (6th Cir. 1987), cert. denied, 485 U.S. 935 (1988); see also NLRB v. Nueva Engineering Inc., 761 F.2d 961, 965 (4th Cir. 1985) (employer's alleged misconduct must be assessed within totality of circumstances surrounding each occurrence at issue).

The basis for applying an objective standard that requires neither a showing of illegal purpose or actual effect is quite straightforward and simple: This section of the Act is, inter alia, "intended to protect employee self-organization from disruptive interference by employers." Russell Stover, supra at 208. Since an employer's conduct can be disruptive of its employees' free exercise of their organizational rights even though the employees are not in fact coerced, an objective standard which examines the reasonable tendency of a particular act from the vantage point of the employee best effectuates the purpose of the Act's prohibition.

It appears that the standard developed to evaluate section 8(a)(1) claims is well suited for adjudication of claims of

intimidation, threats or coercion under section 11(b) of the Voting Rights Act. First, in their respective contexts, both statutes have an identical purpose: to protect a particular group of individuals (employees and voters respectively), from undue interference in the exercise of their constitutional and statutory rights (the right to organize and bargain collectively guaranteed by the National Labor Relations Act and the constitutionally guaranteed right to vote). As noted above, it is this broad protective purpose that forms the basis for the court's adoption of an objective test to evaluate section 8(a)(1) claims. This is especially relevant to Section 11(b), since the legislative history of the section strongly suggests that Congress believed that a "purpose" standard was not effectively protecting voters from interference with their voting rights. In addition, the similarity of the operative terms of the two statutes counsels in favor of adopting the well-established framework for unfair labor practice claims to evaluate claims of voter intimidation under Section 11(b).

In addition, the objective standard is capable of application without infringement of protected First Amendment rights. In NLRB v. Gissel Packing, 395 U.S. 575 (1969), the Supreme Court upheld the NLRB's finding based upon an objective standard that the employers had unlawfully threatened their employees under the Act and rejected the employer's claim that the speech which constituted the unfair labor practice was protected by the First Amendment. While initially noting that "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a Union or the Board[,]" the Court went on to recognize that an "employer's rights cannot outweigh the equal rights of employees to associate freely, as those rights are embodied" in the National Labor Relations Act. Id. at 617. Accordingly, the Court held that an employer's communications which contain a "threat of reprisal or force or promise of benefit" are not protected by the First Amendment and may be validly proscribed. Id. at 618.

The compatibility of an objective standard with First Amendment protections is underscored by the courts' construction of 18 U.S.C. 871, the statute which prohibits threats upon the President. In Watts v. United States, 394 U.S. 705 (1969), the Supreme Court cautioned that because a statute like 18 U.S.C. 871 "makes criminal a form of pure speech, [it] must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." Id. at 707. Accordingly, the Court concluded that "the statute requires the government to prove a 'true' threat," as mere "political hyperbole," is constitutionally protected. Id.

In formulating a standard faithful to Watts and the broad protective purpose of the statute--to protect the President from any statement that would disrupt his activities and movement--the appellate courts have, almost without exception, held that to "establish a "true threat" and thus a violation of the statute, the government need demonstrate only that "the defendant made the statement under such circumstances that a reasonable person would construe them as a serious expression of an intent to inflict bodily harm upon or to take the life of the persons named in the statute." United States v. Callahan, 702 F.2d 964, 965 (11th Cir.), cert. denied, 464 U.S. 840 (1983); see also United States v. Dysart, 705 F.2d 1247, 1256-57 (10th Cir.), cert denied, 464 U.S. 934 (1983); United States v. Rogers, 488 F.2d 512 (5th Cir. 1974), rev'd on other grounds, 422 U.S. 35 (1975); United States v. Lincoln, 462 F.2d 1368 (6th Cir.), cert. denied, 409 U.S. 952 (1972); Roy v. United States, 416 F.2d 874, 877-78 (9th Cir. 1969);but see Rogers v. United States, 422 U.S. 35, 47-48 (1975) (Marshall, J. concurring) (standard permitting conviction based upon reasonable understanding of speaker's statement under section 871(a) should be abandoned and replaced with test which requires proof that speaker "intended his statement to be taken as a threat. . ."). This objective test has also been adopted as the appropriate standard for prosecutions under 18 U.S.C. 876, which prohibits using the mails to send threatening communications. See United States v. Khorrami, 895 F.2d 1186, 1192-93 (7th Cir.), cert. denied, 111 S.Ct 522 (1990); Martin v. United States, 691 F.2d 1235, 1240 (8th Cir. 1982), cert. denied, 459 U.S. 1211 (1983).

The reasonableness inquiry in the context of Section 11(b) is similarly appropriate as a vehicle to distinguish between those words and conduct which are "truly" intimidating, threatening and coercive under the totality of circumstances (i.e. that which would tend to intimidate, threaten or coerce the "reasonable" voter in the particular circumstances) and such words or conduct which are "political hyperbole" or are otherwise constitutionally protected.

2. The Reasonableness Inquiry

The postcard mailing at issue clearly had a tendency to intimidate the "reasonable" voter concerning their exercise of the franchise on November 6, 1990. Such a conclusion is supported by the evidence of actual fear and confusion of the targeted voters, in the form of the personal testimony of the targeted voters as well as the testimony of those election officials and black community leaders who were contacted by concerned targeted voters. Moreover, the comments of black community leaders and others concerning the likely impact of the postcard on elderly black voters who have subject to invidious discrimination at the polls in the past, and the likely impact on younger black voters inexperienced with the voting process, also

militates in favor of a finding that the postcards had a tendency to intimidate the "reasonable voter." Indeed, since the reasonableness inquiry should be made in light of the context of the misconduct and from the viewpoint of the individual(s) at whom the misconduct is directed, see Okun Bros. Shoe Store, supra at 105, the history of discrimination and the continuing vestiges of such discrimination alluded to by black community leaders are critically important to determining whether a violation of Section 11(b) has occurred. See Section III(A)(3), supra.

It should also be emphasized that the fact that some voters may not have been intimidated by the postcard does not negate a finding that the postcard had a tendency to intimidate. Indeed, in Okun Bros. Shoe Store, supra, the court held that the unfair labor practice finding by the NLRB would have been upheld even in the absence of any evidence demonstrating that the employees were intimidated. Id. at 107. Accordingly, those responsible for the postcard mailing clearly violated Section 11(b) of the Voting Rights Act. Additionally, the postcard mailing cannot be defended in this case on the ground that the mailing "advanced a substantial and legitimate interest," and thus is lawful under the balancing test articulated in Darlington Manufacturing, supra. A mailing which contains false and misleading information directed virtually exclusively at black voters cannot reasonably be characterized as an act which furthers a legitimate and substantial interest of the prospective defendant organizations.

C. Proposed Defendants

The investigation demonstrates that Ed Locke and Doug Davidson are proper individual defendants in our proposed lawsuit. With respect to Locke, all of the available evidence indicates that he was the individual primarily responsible for the mailing and all of the decisions made in connection with the mailing evince a desire to intimidate black voters and discourage them from exercising the franchise. The information that we have obtained concerning Doug Davidson, the other individual whom we are aware of who played a significant role in some of the critical decisions concerning the postcard mailing (i.e. the targeting of black voters), reveals that he contributed to the mailing with the understanding that the card was designed to intimidate black voters and thus decrease their turnout for the November 6 election.

The NCGOP, the Helms Committee, and the Jefferson Marketing Companies (which includes Jefferson Marketing, Inc., Discount Paper Brokers, Inc., Campaign Management, Inc. and Computer Operations and Mailing Professionals, Inc.) are proper organizational defendants in our proposed lawsuit. The NCGOP and the Helms Committee are liable by virtue of the fact that they retained Locke to coordinate a "ballot security" program, which as the principals knew at the time he was retained, was to

include a postcard mailing to selected voters. Locke thus served as an agent to these two organizations in coordinating the postcard mailing and all other facets of the "ballot security" program. Moreover, the evidence demonstrates that all of the decisions made by Locke concerning the "ballot security" program were within the broad scope of authority granted to him by these organizations to serve as their agent for the "ballot security" program.

Under common law principles of agency, "[a]n agent is one who is authorized by another (principal) to act on his behalf. An agent-principal relationship is characterized by the presence of two elements. First, there must be an indication by the principal that the agent will act on his behalf and subject to his control. And second, there must be a manifestation of consent by the agent so to act." Johnson v. Bechtel Associates Professional Corp., 717 F.2d 574, 579 (D.C. Cir. 1983), rev'd on other grounds, 104 S.Ct. 1327 (1984); Restatement (Second) of Agency § 1 (1958). The courts have stressed, however, that the critical element in determining whether an agency relationship exists is whether "the agent's acts are subject to the principal's direction and control." In Re Shulman Transport Enterprises, Inc., 744 F.2d 293, 295 (2d Cir. 1984); NLRB v. United Brotherhood of Carpenters, 531 F.2d 424, 426 (9th Cir. 1976). When such criteria are met, those acts of the agent within the confines of the agency relationship are those of the principal. British Amercian & Eastern Co., Inc. v. Wirth Ltd., 592 F.2d 75 (2d Cir. 1979).

Applying these definitional guideposts to the information we have obtained, the relationship between Locke and the NCGOP and the Helms Committee can appropriately be characterized as an agency relationship.

With respect to the NCGOP, NCGOP funds financed the "ballot security" program, including Locke's services. Moreover, NCGOP representatives played a role in deciding to undertake a "ballot security" project and in reviewing Locke's preliminary course of action on "ballot security," which included a postcard mailing to "moved voters" which would address the law concerning voter residency requirements. Hawke apparently chose to defer to Locke's judgment on the some of the specifics of the program; Locke was certainly subject to Hawke's and other NCGOP representatives' direction, however, when he decided to exercise such control.35/

35/ Such control is evidenced by the fact that Ed Locke terminated his plan to compile lists of voters for challenge on election day after being instructed to do so by Hawke and/or Tom Farr, who was representing the NCGOP and Jack Hawke at the time.

With respect to the Helms Committee, representatives of the Committee played a primary role in deciding to undertake a "ballot security" project, in retaining Locke to conduct the project, and in approving a tentative outline for the "ballot security" program, which included a postcard mailing to "moved voters." Moreover, the Helms Committee devoted significant financial and personnel resources--office space within Helms Committee state headquarters and the assistance of Amy Starling, a paid employee of the Helms Committee--to support Locke's activities in implementing a "ballot security" program. Davidson's comment at his interview concerning the Helms Committee's relationship to Locke reveals that the leadership of the Committee viewed Locke as someone acting at their behest and under their control.

Indeed, Locke was certainly subject to the direction and control of the Helms Committee. Doug Davidson, who was working for the Helms Committee during the final months of the campaign and consulted with the Committee leadership on a daily basis, was a conduit through which the Helms Committee could, and perhaps did, assert control over Locke's activities. Paradoxically, although Locke was paid by the NCGOP, the campaign context in which he worked suggests that the Helms Committee likely exerted more control over his activities.

In sum, the "ballot security" program was clearly a joint undertaking by the NCGOP and the Helms Committee, and although Locke was paid and the entire program was financed from NCGOP funds, both organizations played integral roles in retaining Locke, and shaping his activities. Moreover, representatives of both organizations were in positions to direct and control his "ballot security" activities. Accordingly, all of Ed Locke's actions with respect to "ballot security" are those of his principals, the NCGOP and the Helms Committee.

The NCGOP and the Helms Committee may also be liable through the acts of Davidson since he also apparently served as an agent to one or both of the respective organizations for purposes of the "ballot security" program. Although Davidson claims that he was working for the NCGOP in coordinating the "ballot security" program, the evidence strongly suggests that Davidson was in fact working for the Helms Committee in connection with his work on "ballot security." Most telling in this regard is the fact that Davidson recalled several conversations with Helms Committee representatives concerning the "ballot security" program but specifically disavowed any contact with NCGOP representatives concerning "ballot security" or any matter aside from the meeting held with NCGOP representatives and Locke and October 22. Moreover, Davidson was working on the Helms Committee as an events coordinator during the time the "ballot security" program was being implemented. Davidson may have been wearing both hats in connection with his work on "ballot security," but if there is

room only for one hat, the facts reveal that Davidson was wearing the Helms Committee hat when implementing the "ballot security" program.

The fact that an agent engages in unlawful conduct not specifically authorized does not insulate the principal(s) from responsibility. Indeed, it is well established in the fair housing context that a principal is liable for the racially discriminatory conduct of its agent when the agent is acting within the scope of the agency relationship, regardless of whether the principal specifically authorized such conduct. See e.g., Hamilton v. Svatik, 779 F.2d 383, 388 (7th Cir. 1985); Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 552 (9th Cir. 1980); Moore v. Townsend, 525 F.2d 482, 485 (7th Cir. 1975); Izard v. Arndt, 483 F. Supp. 261, 263 (E.D. Wis. 1980). Similarly, under Title VII, an employer has generally been held liable for the discriminatory acts of its agents' delegated authority to make employment and supervisory decisions. See Horn v. Duke Homes, Inc., 755 F.2d 599 (7th Cir. 1985); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

Moreover, in addition to the above theories of liability, we can also argue that irrespective of the scope of authority within which Locke and Davidson conducted their "ballot security" activities, the NCGOP and the Helms Committee are liable for the acts of Locke and Davidson by virtue of their ratification of those acts.

According to the Restatement on Agency, ratification is defined as "[t]he affirmance of a prior act which did not bind [the principal] but which was done or professedly was done on his account, whereby the act, as to some or all persons is given effect as if originally authorized by law." Restatement (Second) of Agency § 82 (1958). The treatise on agency defines "affirmance" as "a manifestation of an election by one on whose account an unauthorized act has been done to treat the act as authorized[.]" Id. at § 83. "A principal can ratify an unauthorized act of an agent purportedly done on behalf of the principal either expressly or by implication through conduct that is inconsistent with an intention to repudiate the unauthorized act." McDonald v. Hamilton Electric, Inc. of Florida, 666 F.2d 509, 514 (11th Cir. 1982); see also Shearson Hayden Stone, Inc. v. Leach, 583 F.2d 367, 369 (7th Cir. 1978).

Generally, if at the time of an act of affirmance, the purported principal is ignorant of material facts involved in the original transaction, and is unaware of his ignorance, then the affirming act generally does not bind the principal. Id. at § 91. However, it is well established that if the "purported principal is said to have knowledge of facts [concerning the purported agent's conduct] which would lead a person of ordinary prudence to investigate further, and he fails to make such an

investigation, his affirmance without qualification is evidence that he is willing to ratify upon the knowledge that he has," and thus the principal may be liable for the conduct in question. Id. at § 91 (comment e); Computel, Inc. v. Emery Air Freight, Corp., 919 F.2d 678, 682-85 (11th Cir. 1990); Renault v. L.N. Renault & Sons, 188 F.2d 317, 321 (3d Cir. 1951); Lewis v. Cable, 107 F. Supp. 196, 198 (W.D. Pa. 1952)

With respect to the NCGOP, Hawke's public claim of responsibility for the postcard as part of the NCGOP's "ballot security" program and his defense of the propriety of the postcard in response to press inquiries, all prior to the initiation of our investigation, and likely subsequent to learning of the precise details of the mailing (Hawke spoke to Locke personally on October 30 or October 31), clearly constitutes an act of affirmance of the postcard mailing.

Moreover, there are other acts of "affirmance" that bind the Helms Committee and/or the NCGOP. First, Locke was fully paid for his services and reimbursed for his expenses on November 15, more than two weeks after the postcard mailing. Thus, Locke was paid in full after the principals of the organizations knew that the card contained false and misleading information and probably after they discovered the virtual racial exclusivity of the mailing. Such conduct certainly qualifies as an act of "affirmance" under the common law principles of agency.

The attempt to remail first-class postcards to residents of Mecklenburg County can also fairly be viewed as an act of affirmance by those who made the decision to undertake the remailing effort (likely principals of the Helms Committee and/or the Jefferson Marketing Companies). The remailing effort was undertaken contemporaneous with press reports that the cards contained false information and that they were targeted primarily to black voters throughout the state.

Any claim that some or all of the principals were unaware of the precise selection criteria used in the postcard mailing at the time the NCGOP publicly took responsibility for and defended the mailing, at the time of the remailing effort, and at the time Locke was paid for his services is unavailing in this context on two different grounds. First, at the time Mr. Hawke stated that the postcard mailing was a legitimate component of the party's "ballot security" program, Hawke also told the press that the mailing was aimed at registered voters in overwhelmingly Democratic precincts, and that black voters constituted the great majority of voters in such precincts. Thus, at the time he took responsibility for the postcard mailing, Hawke understood that many, if not most of the cards were aimed at black voters in the state and consequently was aware of the essential or "material" facts involved in the postcard mailing. Accordingly, any ignorance of the specific details at the time of this public

embrace of the mailing does not insulate Hawke's words as serving as evidence of ratification.

Second, from the moment receipt of the postcards was reported to the press, the principals of the prospective defendant organizations had sufficient information that would lead a reasonable person to investigate further concerning the criteria employed for the postcard mailing. Thus, even if some or all of the principals did not know the precise details at these critical junctures--which is unlikely--their actions demonstrate that they were willing to accept responsibility for the postcard mailing with less than complete information and thus ratification may be inferred from their various acts of affirmance during the three week period subsequent to the actual mailing of the postcards. See id. at § 91 (comment e).

Finally, all three Jefferson Marketing Companies may be held liable by virtue of Davidson and Kervin's activities. Davidson, an employee of Campaign Management, Inc. (and formerly the President of Jefferson Marketing, Inc.) appears to have exercised managerial and supervisorial control over employees of all three companies and to have devoted significant resources from all three companies toward the postcard mailing effort. Kervin's role in the remailing effort can also be relied upon in assigning liability, at least with respect to Discount Paper Brokers, Inc. In addition, evidence obtained thus far suggests that other employees within the Jefferson Marketing Companies may have played a material role in the drafting process. Jefferson Marketing, Inc. should also be named as a defendant since the three corporations are wholly-owned subsidiaries of Jefferson Marketing, Inc. Accordingly, Jefferson Marketing may be an indispensable defendant to obtain full relief against all of the Jefferson Marketing Companies.

IV. Relief

I recommend that we seek declaratory and injunctive relief against all named defendant individuals and organizations. Specifically, we should ask the court to declare that the postcard mailing violated 42 U.S.C. 1971(b) and 42 U.S.C. 1973i(b).

I also recommend that we ask the court to enjoin all defendants from undertaking any activities designed to intimidate, threaten or coerce voters concerning their exercise of the franchise. To ensure compliance, we should request that the court retain jurisdiction and require that any defendants submit to the court for review prior to implementation any "ballot security" mailing or other proposed activity, or at least any such program in which the targeting criteria is, either wholly or in part, based on racial or ethnic criteria. Under

such a procedure, we would also be provided with the "submission" and would have a specified period of time to file any objections with the court. This type of remedy would be an effective method to prevent disruptive activity to minority voting rights before the conduct occurs and the harm is done.

Counsel for both the NCGOP and the Helms Committee have indicated a willingness to engage in settlement discussions to dispose of the case. While we have not delved into any detail on the issue, counsel for the NCGOP did express his willingness to consider a type of "preclearance" mechanism as outlined above as part of a final settlement.

V. CONCLUSION

For the foregoing reasons, I recommend that you authorize the filing of a complaint alleging that the named defendants intimidated and threatened or attempted to intimidate and threaten black voters concerning their right to vote, in violation of 42 U.S.C. 1971(b) and 42 U.S.C. 1973i(b).

APPROVED_____

DISAPPROVED_____

COMMENTS: